TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 340.

THOMAS BRAM, OTHERWISE CALLED THOMAS C. BRAM, OTHERWISE CALLED THOMAS M. BRAM, OTHERWISE CALLED A. THOMAS BRAM, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED MARCH 27, 1897.

(16841.)

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1 *Writ of error.*

UNITED STATES OF AMERICA, ss.

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, in a cause entitled United States by indictment against Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, a manifest error hath happened, to the great damage of the said Thomas Bram, so otherwise called as aforesaid, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States at Washington, together with this writ, so that you have the same at the city of Washington on the sixth day of April next, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the ninth day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States, District of Massachusetts.

Allowed by—

LE BARON B. COLT,
U. S. Circuit Judge.

NATHAN WEBB,
Dist. Judge.

2 *Return of circuit court on writ of error.*

Circuit court of the United States, district of Massachusetts, ss.

And now here, the judges of the circuit court of the United States, in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, Alexander H. Trowbridge, clerk of said circuit court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court this twenty-fifth day of March, A. D. 1897.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-six, before the Honorable William L. Putnam, circuit judge.

On the twenty-sixth day of September, A. D. 1896, it was ordered by the court that venires issue for twenty-three grand jurors and fifty-one petit jurors, the grand jurors to come in on Thursday, the fifteenth day of October, A. D. 1896, at ten o'clock a. m., and the petit jurors to come in on Monday, the twenty-sixth day of October, A. D. 1896, next, at ten o'clock a. m., the same to be selected from the cities and towns named in Table No. 50 and apportioned as follows:

	Grand.	Petit.		Grand.	Petit.
Boston	3	8	Hyde Park	2	5
Adams	2	5	Chatham	3	5
Cambridge	3	6	Stoneham	2	5
Woburn	3	6	West Newbury	2	5
Nantucket	2	5	Plainfield	1	1

And thereupon venires were duly issued for said grand and petit jurors.

4 In obedience to the said order of court and to the venires issued thereunder, the following-named grand jurors attended on the fifteenth day of October, A. D. 1896. On that day the said grand jurors were duly empanelled as the grand jury for the October term of this court, A. D. 1896. All of said grand jurors, being empanelled as aforesaid, were duly sworn, except Grand Juror William Merrill, junior, of West Newbury, who duly affirmed, twenty-one grand jurors being in attendance, namely:

1. Albert L. Bowen, foreman ..... of Adams.
2. Erastus T. Bearse ..... " Chatham.
3. Walter E. Collins ..... " Boston.
4. Joseph W. Estabrook ..... " Cambridge.
5. Robert J. Forsythe ..... " West Newbury.
6. Eugene H. Gardner ..... " Plainfield.
7. Lyman Gerry ..... " Stoneham.
8. George G. Hall ..... " Boston.
9. Jacob A. Ham ..... " Woburn.
10. Calvin Hammond ..... " Chatham.
11. William F. Hadley ..... " Stoneham.
12. Horace R. Keay ..... " Cambridge.
13. J. Fred Leslie ..... " Woburn.
14. William A. Mitchell ..... " Woburn.
15. Charles L. Marks ..... " Nantucket.
16. William F. McCluskey ..... " Cambridge.
17. William Merrill, jr ..... " West Newbury.
18. Frank H. Radford ..... " Hyde Park.
19. Levi A. Runnells ..... " Hyde Park.
20. David E. Ray ..... " Nantucket.
21. Thomas Scollen ..... " Adams.

5 On the said fifteenth day of October the said grand jury were charged by the court, the Honorable William L. Putnam, circuit judge, sitting.

On the said fifteenth day of October, A. D. 1896, the following order of court is entered:

ORDER OF COURT.

Ordered, that the petit jurors who have been summoned to appear before the court October 26, 1896, be notified by the marshal that they are not required to appear until Wednesday, November 4, 1896, at 10 a. m.

By the court:

ALEX. H. TROWBRIDGE, *Clerk.*

UNITED STATES BY INDICTMENT *v.* THOMAS BRAM, OTHERWISE CALLED Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram.	No. 1790, Criminal Docket.

At the present term of this court, on the twenty-ninth day of October, A. D. 1896, the Honorable Thomas L. Nelson, district judge, sitting alone and holding this court, the following indictment is presented by the said grand jury; the said grand jury being composed of the said twenty-one grand jurors who were in attendance in the court on the said fifteenth day of October, A. D. 1896.

6 United States of America.

At a circuit court of the United States of America, for the district of Massachusetts, begun and holden at Boston, within and for said district, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-six.

The jurors for the United States of America, within and for the district of Massachusetts, upon their oath, present that Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought, in and upon one Charles I. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within

the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain axe, him, the said Charles I. Nash, in and upon the head of the said Charles I. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and
7 there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Charles I. Nash in and upon the head of the said Charles I. Nash divers mortal wounds, of which said mortal wounds the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought him, the said Charles I. Nash, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present
and say, that the said district of Massachusetts is the district of
8 the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Charles I. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain sharp instrument, the name of which and

a more particular description of which are to said jurors unknown,
9 him the said Charles I. Nash in and upon the head of the said Charles I. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Charles I. Nash in and upon the head of the said Charles I. Nash divers mortal wounds, of which said mortal wounds the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought him the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

10 And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura A. Nash an assault did make, and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State

11 thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain axe, her the said Laura A. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash unlawfully, feloniously, wilfully, and of his

malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura A. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash divers mortal wounds, of which said mortal wounds the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

12 And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura A. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit,

13 upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel with a certain sharp instrument, the name of which and a more particular description of which are to said jurors unknown, her the said Laura A. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash unlawfully, feloniously, wilfully, and of his malice aforethought

did strike, penetrate, and wound, thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura A. Nash, in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash divers mortal wounds, of which said mortal wounds the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of
14 the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice afore-
15 thought in and upon one Laura R. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain axe her the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of

the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash divers mortal wounds, of which said mortal wounds the said Laura R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura R. Nash, then and there, to wit, upon the high seas within the admiralty and maritime jurisdic-
16 tion of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and
17 a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura R. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain sharp instrument, the name of which and a more particular description of which are to said jurors unknown, her the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash unlawfully, feloniously, wilfully and of his malice aforethought did strike, penetrate, and wound thereby, then, and there,

to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura R. Nash, in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash divers mortal wounds, of which said mortal wounds the said Laura R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said
18 vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully and of his malice aforethought her the said Laura R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

A true bill:

ALBERT L. BOWEN,
Foreman of the Grand Jury.

JOHN H. CASEY,
Assistant United States Attorney for the District of Massachusetts.

19 On the fourth day of November; A. D. 1896, the petit jurors attended the court pursuant to order of court of October 15th, 1896, hereinbefore set forth, forty-nine being present from the following named cities and towns:

Boston	8	Hyde Park	5
Adams	5	Chatham	5
Cambridge	6	Stoneham	5
Woburn	6	West Newbury	5
Nantucket	3	Plainfield	1

On the sixth day of November, A. D. 1896, at the request of prisoner and in his presence, the court assigns James E. Cotter and Asa P. French as his counsel, the Honorable Le Baron B. Colt, circuit judge, sitting alone and holding the court.

On the said sixth day of November the following pleas and motion are filed.

Plea in abatement.

Now comes Thomas M. Bram and moves that the indictment returned against him in said case be abated, for the following reasons, to wit:

1. Because certain of the grand jurors who found and returned said indictment were not duly sworn before they considered the evidence against said defendant and returned said indictment into court.

2. Because certain of the said grand jurors who acted upon the evidence against the said defendant objected and refused to being sworn, but affirmed.

20 3. The indictment omits to allege that the same was found and presented upon the oath and affirmation of said grand jurors.

THOMAS M. BRAM.

Plea to jurisdiction.

And now comes the said Thomas M. Bram, the defendant named in the indictment found in the above-entitled case, and says that the said court ought not to take cognizance of the crime in the said indictment above specified, because, protesting that he is not guilty of the same, nevertheless, the said Thomas M. Bram says that the said district is not the district wherein said defendant was found or into which he was first brought after the commission of the offience set forth in said indictment; and this the said Thomas M. Bram is ready to verify; wherefore he prays judgment if the said court will or ought to take cognizance of the indictment aforesaid, and by the said court he may be discharged.

THOMAS M. BRAM.

21

Motion to quash.

And now comes the defendant, after return of the indictment into court and before plea, and moves that the indictment in said case be quashed, and for the following reasons, viz:

1. Because the said indictment does not allege and charge any offence with sufficient certainty and precision.
2. Because the said indictment is vague and uncertain.
3. Because different counts are improperly joined or included in same indictment.
4. Because certain of the grand jurors who found and returned said indictment were not duly sworn before they considered the evidence against said defendant and returned said indictment into court.
5. Because certain of the said grand jurors who acted upon the evidence against the said defendant objected and refused to being sworn, but affirmed.
6. The indictment is defective in omitting to allege that said indictment was found and presented upon the oath and affirmation of said grand jurors.

THOMAS M. BRAM.

22 On the said sixth day of November, in the presence of the prisoner, the court assigns Thursday, November 12th, at 11 a. m., as the day for hearing the foregoing pleas and motion, the Honorable Le Baron B. Colt, circuit judge, sitting alone and holding the court.

And on the same day, in the presence of the prisoner, the court orders that the prisoner be held without bail to answer to the indictment. Thereupon a warrant to commit pursuant to the order of court is duly issued and the prisoner is committed to jail thereunder.

On the twefth day of November, A. D. 1896, the following supplementary plea is filed:

Supplementary plea in abatement.

And now comes Thomas M. Bram and moves that the indictment returned against him in said court be abated, for the following reasons, in addition to those set forth in his plea in abatement heretofore filed in said cause, to wit:

Because one of the grand jurors who found and returned said indictment was not duly sworn before said grand jurors considered the evidence against said defendant and returned said indictment into court, and

Because one of the grand jurors who found and returned said indictment was permitted to affirm instead of being sworn without
23 stating and without being asked as to the fact that he was conscientiously scrupulous of being sworn.

THOMAS M. BRAM.

On the said twelfth day of November the following-named affidavits and certificate are filed in support of the foregoing pleas and motion:

Defendant's affidavit, affidavit of Alexander H. Trowbridge, certificate of Alexander H. Trowbridge.

On the thirteenth day of said November the following motions to dismiss are filed, viz:

Motion to dismiss plea in abatement and supplemental plea.

And hereupon Sherman Hoar, the United States attorney for the district of Massachusetts, who prosecutes for the United States of America in this behalf, comes and moves that said plea in abatement and said supplemental plea in abatement be dismissed because

First. Said plea in abatement and said supplemental plea in abatement in form do not contain the required prayer that the indictment be quashed; because

Second. Said plea in abatement and said supplemental plea in abatement were not filed within the time required by the rules of the circuit court; because

Third. Said plea in abatement and said supplemental plea in
24 abatement consist in part of matters in fact outside of the record and such matters of fact are not supported by sufficient affidavit of the defendant or of his attorney; because

Fourth. Said plea in abatement and said supplemental plea in abatement consisting in part of matters outside of the record were not filed within the time required by the rules of this court, supported by sufficient affidavits as in such cases required; because

Fifth. Said plea in abatement and said supplemental plea in abatement did not bear certificate of counsel that said pleas were interposed in good faith and not for purposes of delay; because

Sixth. Said plea in abatement states two distinct defenses as grounds for abating said indictment; because

Seventh. Said plea in abatement states inconsistent grounds for abating said indictment; because

Eighth. Said supplemental plea in abatement states two distinct defenses as grounds for abating said indictment; because

Ninth. Said supplemental plea in abatement states inconsistent grounds for abating said indictment; because

Tenth. Said third specification in said plea in abatement does not set forth any matter upon which a plea in abatement can be founded; because

Eleventh. Said second specification in the said plea in abatement sets forth no cause for abating said indictment; because

25 Twelfth. In said first specification of said supplemental plea in abatement it is not alleged in what particular said one of said grand jurors was not duly sworn; because

Thirteenth. Said second specification of said supplemental plea in abatement sets forth no matter sufficient in law on which to found the abatement of said indictment; because

Fourteenth. Said plea in abatement and said supplemental plea in abatement contain no averment that any of the matters therein stated were to the injury or to the prejudice of the said defendant; because

Fifteenth. None of the matters averred in said plea in abatement and said supplemental plea in abatement were to the injury or to the prejudice of the said defendant.

Wherefore, for the reasons aforesaid in this behalf he, the said Sherman Hoar, for the said United States of America, prays that said plea in abatement and said supplemental plea in abatement be dismissed and that said defendant may answer to the said indictment.

SHERMAN HOAR,
United States Attorney.

26 *Motion to dismiss plea to jurisdiction.*

And hereupon Sherman Hoar, the United States attorney for the district of Massachusetts, who prosecutes for the United States of America in this behalf, comes and moves that said plea to the jurisdiction be dismissed, because

First. That said plea was not filed within the time prescribed by the rules of this court; because

Second. Said plea consisted in part of matters of fact outside the record in this case, which matters of fact were not supported by the affidavit of the defendant or his attorney; because

Third. Said plea is defective and not in proper form, in that it does not state within what jurisdiction the defendant claims the offence described is cognizable; because

Fourth. Said plea is defective and not in proper form in that it does not state or specify any facts sufficient to oust this court of jurisdiction in this behalf.

Wherefore, for the reasons aforesaid in this behalf he, the said Sherman Hoar, for the United States of America, prays that said plea be dismissed and that said defendant may answer to the said indictment.

SHERMAN HOAR,
United States Attorney.

27 The foregoing plea in abatement, supplemental plea in abatement, plea to jurisdiction, and motion to quash thereupon come on to be heard, in the presence of the prisoner, by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge of the United States for the district of Maine, duly designated and appointed by the Honorable Le Baron B. Colt, circuit judge, to hold the present October term of this circuit court, or any part thereof, in aid of the district judge for the district of Massachusetts, sitting together and holding the court.

Thereupon during said hearing the said plea to the jurisdiction is withdrawn by the defendant.

After arguments of counsel, in the presence of the prisoner, and due consideration by the court, the said plea in abatement, supplemental plea in abatement, and motion to quash are, on the fourteenth day of November, A. D. 1896, in the presence of the prisoner, overruled by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge for the district of Maine, sitting together as aforesaid and holding the court.

Thereupon, on motion of the attorney for the United States, made in the presence of the prisoner, the said Thomas Bram, otherwise known as aforesaid, is set to the bar and has this indictment read to him; whereupon he says that thereof he is not guilty.

28 It is thereupon, in the presence of the prisoner, ordered by the court that the prisoner at the bar be furnished with a copy of the indictment and a list of the jurors and of the witnesses to be produced on the trial for proving the indictment at least two entire days before the trial, in accordance with the statute, and with process of the court to compel his witnesses to appear at his trial.

The court thereupon, in the presence of the prisoner, assigns December 14th, 1896, at 10 a. m., as the time for the trial to begin.

On the fourteenth day of said November, A. D. 1896, the court orders, in the presence of the prisoner, that venires issue for one hundred additional petit jurors to come in on Monday, the fourteenth day of December, A. D. 1896.

On the seventeenth day of said November, A. D. 1896, an extended order of court for said one hundred additional jurors is entered as follows:

Orders for special venires—Nov. 17, 1896.

Ordered that venires issue for one hundred additional petit jurors to come in on Monday, the fourteenth day of December next, at ten o'clock a. m., from the several cities and towns named in Table No. 50, and apportioned as follows, namely:

Boston	16	Hyde Park	9
Adams	9	Chatham	9
Cambridge	14	Stoneham	9
Woburn	13	West Newbury	9
Nantucket	9	Plainfield	3

By the court:

ALEX. H. TROWBRIDGE, *Clerk.*

29 Pursuant thereto a grand venire is issued and given to the United States marshal for service, together with ten subordinate venires severally directed to the constables of said respective cities and towns for service, upon which grand venire, on the fourteenth day of December, 1896, the marshal makes return into court, as follows:

UNITED STATES OF AMERICA, *District of Massachusetts, ss:*

BOSTON, *December 14th, 1896.*

In obedience to the within precept, I have caused eighty-six good and lawful men to be summoned to serve as petit jurors to come before the October term, 1896, of the circuit court now holden, mentioned in nine venires committed to me at the same time with this precept for distribution, and the names of the persons returned to me by virtue of said venires are herewith returned to court. The venire for Cambridge was not served.

HENRY W. SWIFT,
U. S. Marshal.

Fees:

Paid constables	$18.00
Service	20.00
	$38.00

All of the said subordinate venires so issued as aforesaid, except the subordinate venire directed to either of the constables of the city of Cambridge, were duly served by the constables of the several cities and towns to which they were respectively directed, and the said subordinate venire directed to either of the constables of the city of Cambridge were, on December 12, 1896, returned without service by the constable in whose hands it had been placed.

29a On the seventeenth day of November, A. D. 1896, the prisoner is duly served with a certified copy of the indictment.

On the seventh day of December, A. D. 1896, it is ordered by the court, the honorable Edgar Aldrich, district judge of the United States for the district of New Hampshire, duly assigned to hold said circuit court sitting, that the jurors now present not in case No. 473 be excused until Monday, December 14, 1896, at 10 a. m., namely: Solomon C. Atwood, Theophile Brodeur, Martin Best, T. Weston Bryant, George O. Baird, Elijah Ball, Oliver J. Briggs, James N. Benjamin, James Buckley, Albert Brown, Oliver E. Eldridge, Nelson A. Newhall, Parker H. Nason, and Arthur A. Norcross.

On the ninth day of December, A. D. 1896, the prisoner is duly served with a list of the names and places of abode of the witnesses to be produced at the trial for proving the indictment, and with a list of the names and places of abode of the petit jurors required to attend at the trial, said list of petit jurors containing the names of the

30 additional petit jurors duly served in pursuance of said order of November 14, 1896, and of the venires issued thereunder, and of the names of fourteen petit jurors served in pursuance of said order of September 26, 1896, and of the venires issued thereunder; said fourteen petit jurors being all of said petit jurors served in pursuance of said order of September 26, 1896, and of the venires issued thereunder, who

were still in attendance on the court and not engaged in the trial of any other cause.

Said additional petit jurors, of whom eighty-two attended for the trial of said cause on the fourteenth day of December, A. D. 1896, were apportioned as follows:

Boston	15	Chatham	8
Adams	9	Stoneham	9
Woburn	12	West Newbury	9
Nantucket	8	Plainfield	3
Hyde Park	9		

Said fourteen petit jurors who also then and there attended for the said trial were apportioned as follows:

Boston	2	Stoneham	1
Adams	2	West Newbury	3
Nantucket	1	Plainfield	1
Chatham	2	Cambridge	2

31 On the said fourteenth day of December, the honorable LeBaron B. Colt, circuit judge, and the honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid, the following challenge to the array is filed, with an affidavit of Edward J. Brandon in support thereof:

Challenge to the array and especially to the persons substituted for the jurors ordered to be drawn from Cambridge.

And now comes Thomas M. Bram, the defendant named in said indictment, in his proper person, when the jury is about to be empanelled to try the issue in said indictment, and says that the said array is an illegal one, and that the order of this honorable court in reference to the drawing and apportioning of jurors for the trial of this case from different cities and towns in the district of this court in accordance with the provisions of section 802 of the Revised Statutes of the United States has not been complied with, but has been evaded.

That at a session of this court on the 14th day of November, 1896, the district attorney for the United States for said district moved, in the presence of the defendant in open court, that a special panel, consisting of one hundred jurors, be drawn, from which jurors were to be selected to try the defendant of the offence charged in said indictment; that the defendant, by his counsel, in open court, assented to the said motion of the district attorney. Thereupon, on the 17th day of November,
32 1896, it was ordered by the court that venires issue for one hundred additional jurors to come in on Monday, the 14th day of December, 1896, at 10 o'clock in the forenoon, from the several cities and towns named in table No. 50, and apportioned as follows, viz:

Boston, sixteen; Adams, nine; Cambridge, fourteen; Woburn, thirteen; Nantucket, nine; Hyde Park, nine; Chatham, nine; Stoneham, nine; West Newbury, nine; Plainfield, three.

That the defendant expected that this order of the court would be complied with; that he is advised it was his right, and he desired, and still desires, to be tried by a jury drawn pursuant to that order; that it now appears by the list of jurors presented to the defendant that the

apportionment materially differs from said order of the court, and that by said present list the jurors are unjustly and against the interest of the defendant apportioned as follows, viz:

Boston, seventeen; Adams, eleven; Cambridge, two; Woburn, twelve; Nantucket, nine; Hyde Park, nine; Chatham, eleven; Stoneham, ten; West Newbury, twelve; Plainfield, four.

That the apportionment on said list now before the defendant is contrary to the order of this court and in violation of section 802 of said Revised Statutes.

1st. Because no jurors were drawn from the city of Cambridge under said order of this honorable court of November 17th, 1896; that a larger number of jurors appear upon the list now before the defendant from the towns of Chatham, West Newbury, Plainfield, Stoneham, and
33 Adams than was stated or authorized in said order of November 17th.

2nd. Because the following-named persons upon said list, to wit, Solomon C. Atwood, Theophile Brodeur, Martin Best, T. Weston Bryant, George O. Baird, Elijah Ball, Oliver J. Briggs, James N. Benjamin, James Buckley, Albert Brown, Oliver E. Eldridge, Nelson A. Newhall, Parker H. Nason, and Arthur A. Noreross, have been summoned and have discharged duties as jurors in this court within less than one year of the time assigned for the trial of the defendant, and were not drawn or summoned to attend this special sitting of this court pursuant to said order of November 17th, 1896.

3rd. Because the fourteen jurors last named were without right and without the knowledge or consent of the defendant substituted for the fourteen persons which this court by its order of November 17th ordered to have drawn and returned from the city of Cambridge, and the defendant now objects to such substitution as a violation of his legal rights.

4th. Because the list of jurors now presented to the defendant contains the names of persons not residing within the several cities and towns named in Table No. 50 and in said order of this court dated November 17th, 1896.

5th. That a meeting of the board of aldermen of said city of Cambridge was called for Monday, the 7th day of this month, for the purpose of drawing jurors pursuant to said order of this court. That on said 7th day of December, after notice had issued for said meeting of the
34 board of aldermen of said Cambridge, and before the arrival of the hour for which said meeting had been called, an official of the United States notified the clerk of said city of Cambridge that it would not be necessary to hold said meeting, as no jurors would be needed from said Cambridge, and consequently none were drawn from that city.

6th. Because the venires on which said jurors were drawn were not properly served or by persons qualified to serve the same.

All the foregoing the defendant is ready to verify.

And so the defendant says that the persons named in said list do not constitute a legal jury; that the order of this court was not complied with; that the jurors are not apportioned in such a manner as to be just to the defendant; and this he is ready to verify.

THOMAS M. BRAM.

On the said fourteenth day of December the following replication to the challenge to the array is filed:

Replication to the challenge to the array.

And thereupon Sherman Hoar, attorney for the Unites States of America for the district of Massachusetts, who prosecutes for said United States of America in this behalf, says that by reason of anything in said pleading by Thomas Bram, alias alleged, the said United States of America ought not to be precluded from prosecuting said indict-
35 ment against the said Thomas Bram alias, because he says—

First. That said jury was impartially drawn according to the laws of said United States of America.

Second. That said jury was not selected by design, but was drawn impartially as aforesaid.

Third. That a larger number of jurors does not appear upon the list before the defendant from the towns of Chatham, West Newbury, Plainfield, Stoneham, and Adams than was stated and authorized to be drawn from said towns by orders of this honorable court.

Fourth. That the jurors specifically named in the list in specification two in the defendant's challenge to the array were regularly summoned as jurors in this court for the present October term thereof, and are liable for service, and are now attending said term of court and not engaged in any other trial, and are properly liable to be called as jurors for the trial of said defendant.

Fifth. That the fourteen jurors above mentioned have not been substituted for any other fourteen persons which this honorable court by its order of November 17th ordered to have drawn and returned from the city of Cambridge.

Sixth. That the list of jurors now presented to the defendant contains no names of persons not residing within the several cities and towns named in Table No. 50.

And this the said Sherman Hoar is ready to verify. Wherefore
36 he prays judgment, and that the said Thomas Bram may be required to go before said jury.

SHERMAN HOAR,
U. S. Attorney.

The cause thereupon comes on to be heard by the court in the presence of the prisoner upon the foregoing challenge to the array, and the same, after arguments of counsel, in the presence of the prisoner, and due consideration by the court, is disallowed, in the presence of the prisoner, by the court.

On the same day, to wit, December 14, 1896, before the defendant is set to the bar for trial, the attorney of the United States for said district makes the following endorsement on the indictment:

"Dec. 14, 1896. I will no further prosecute the third, fourth, fifth, and sixth counts in this indictment.

"JOHN H. CASEY,
"*Asst. U. S. Attorney.*"

And thereupon on the same day, before the jury is empanelled and sworn, the said attorney for the United States says in open court, in the presence of the prisoner, that he has nol prossed the indictment as to the third, fourth, fifth, and sixth counts thereof.

Thereupon, in the presence of the prisoner, the entire list of petit jurors served on the prisoner as aforesaid is called, and ninety-six answer to their names.

37 A jury is thereupon, in the presence of the prisoner, from the entire number of jurors so answering to their names, empanelled and duly sworn to try the issue, the prisoner exercising his right to challenge any juror according to law, namely: Rinaldo A. Jack, foreman; Robert S. Brown, Harry J. Booth, Warren N. Blake, Edward J. Burke, Oliver J. Briggs, Sheperd R. Dyer, Abel C. Ford, Stephen H. Green, Charles A. Howes, John J. Hughes, and Henry J. Arnold, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid.

On the said fourteenth day of December Francis X. Macdonald, Hugh C. McGonigle, James C. Ruhl, James J. O'Hare, and John J. Harrington, in the presence of the prisoner, are duly sworn as bailiffs to attend the jury empanelled in this cause.

This cause, after a full hearing in the presence of the prisoner, before the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid, is, in the presence of the prisoner, committed to the said jury, who, in the presence of the prisoner, return their verdict therein, and on oath say that the said Thomas Bram, otherwise known as aforesaid, is guilty.

On the fifth day of January, A. D. 1897, the following motion is filed, namely:

38 *Defendant's motion for a new trial.*

And now comes Thomas M. Bram, the defendant in the above-entitled cause, and moves that the verdict therein be set aside and a new trial ordered, for the following reasons, namely:

First. Because the verdict is against the evidence and the weight thereof.

Second. Because the interruptions, statements of fact and opinions and examinations of witnesses by one member of the court during the trial were partial, argumentative, and unduly prejudicial to the defendant, insomuch that the defendant has been deprived of a fair trial; and because incompetent and prejudical matter introduced by one member of the court by questions and statements and characterizations of the defendant and his testimony, and of the closing argument in his behalf, forced the defendant's counsel to protest in the presence of the jury, and thereby to place themselves in the attitude of antagonizing the opinion of the court in respect to the question of guilt or innocence of the defendant; and because the withdrawal of such matter, statements, opinions, and characterizations (where they were withdrawn) could not and did not remove the unwarrantable influence and prejudice thereby injected into the minds of the jurors.

Third. Because the closing argument of the United States
39 attorney was improper in tone, language, and manner, and because its tendency was, and its effect must have been, to unduly excite the passions of the jury, and to arouse in them a feeling of hatred and contempt for, and prejudice against, the defendant, as well by reason of its said tone, language, and manner, as by unjustifiable inferences and deductions from the testimony, and by innuendoes from assumptions of fact not in evidence; and, further, because he argued upon evidence excluded by the court.

Fourth. Because it appears that the jury misapprehended and misapplied the instructions of the court given them on the morning of Saturday, January second, 1897, when the jury came into court for further instructions, insomuch that they believed, or certain of them believed, that they were then instructed that they must of necessity agree; that the minority must of necessity conform to the opinion of the majority, and that it would not be lawful for them to disagree unless they unanimously concurred in disagreeing.

Fifth. Because it appears that certain of the jurors had prejudged the defendant.

Sixth. Because of the misconduct of certain of the jurors during the trial.

Seventh. Because of the misconduct of certain of the jurors after the case had been given to the jury.

Eighth. Because a certain person or persons in the service of
40 the United States were permitted to and did improperly communicate and intermeddle with certain of the jurors during the progress of the trial.

THOMAS M. BRAM,
By his attorneys
JAMES E. COTTER and
ASA P. FRENCH.

On the fifteenth day of January, A. D. 1897, the following motion is filed, namely:

Motion to amend motion for new trial.

And now comes Thomas M. Bram, the defendant in the above-entitled cause, and moves to amend his motion for a new trial heretofore filed in said cause, by inserting after the paragraph numbered "eighth" therein the following:

Ninth. Because said verdict is against the law.

THOMAS M. BRAM,
By his counsel,
JAMES E. COTTER and
ASA P. FRENCH.

On the sixteenth day of January, A. D. 1897, the following motion is filed, namely:

41 *Motion in arrest of judgment.*

And now comes Thomas M. Bram, the defendant in the above-entitled cause, after verdict therein, and moves the court to arrest judgment in

said cause and to hold the indictment and verdict for naught, for the following reason, to wit:

Because upon the record and proceedings in said cause it does not appear that the barkentine the "Herbert Fuller," upon which the offence alleged in said indictment is charged to have been committed, was a vessel of the United States at the time of the commission of said offence, and that this court rightfully had jurisdiction of said offence.

THOMAS M. BRAM.
By JAMES E. COTTER and
ASA P. FRENCH,
His Counsel.

On the eighteenth day of January, A. D. 1897, the following-named affidavits in support of the motion for new trial are filed, namely:

Affidavit of Harry J. Booth, supplementary affidavit of Harry J. Booth, affidavit of James J. Connell, affidavit of Sylvanus B. Coffin.

On the nineteenth day of January, A. D. 1897, the following-named affidavits in support of motion for new trial are filed, namely:

Affidavit of Asa P. French, affidavit of James E. Cotter.

42 On the same day the specifications on said motion for new trial are filed.

On the twentieth day of January, A. D. 1897, an affidavit of Thomas M. Bram on said motion is filed.

On the twenty-first day of January, A. D. 1897, specifications under third ground alleged in motion for new trial are filed.

The cause thereupon, in the presence of the prisoner, comes on to be heard by the court on the foregoing motion for new trial, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid, and, in the presence of the defendant, is fully heard upon arguments of counsel for the defendant and for the Government.

At said hearing the motion to amend the motion for new trial is waived by the defendant.

On the eighth day of February, A. D. 1897, the following motion is filed, namely:

Motion for new trial on ground of newly discovered evidence.

And now comes Thomas M. Bram, the defendant in the above-entitled cause, and moves the court to set aside the verdict therein and order a new trial on the ground that certain new evidence has been discovered since the rendering of said verdict material to the issue involved in said indictment, the character of which evidence will more fully appear
43 from the affidavits of Jonathan Spencer, Wallace Downey, and Hugh G. Messenger, filed herewith, and reference to which is hereby made.

By his counsel:

JAMES E. COTTER.
ASA P. FRENCH.

We hereby certify that the information contained in the affidavits above referred to, upon which the foregoing motion is based, was not

obtained by us and could not of necessity have been obtained by us, by the exercise of due diligence, until after the rendering of the verdict in said cause.

JAMES E. COTTER.
ASA P. FRENCH.

In support of said last-mentioned motion the following-named affidavits are filed:

Affidavit of Hugh G. Messenger, affidavit of Wallace Downey, affidavit of Jonathan Spencer.

On the ninth day of February, A. D. 1897, the motion for new trial, filed January 5, 1897, is, in the presence of the prisoner, denied by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid.

On the said ninth day of February the defendant withdraws his motion in arrest of judgment filed on the sixteenth day of January, A. D. 1897.

On the tenth day of February, A. D. 1897, the following-named
44 affidavits are filed in support of the motion for new trial on the ground of newly discovered evidence:

Affidavit of Thomas M. Bram, affidavit of James E. Cotter, affidavit of Asa P. French.

Thereupon, in the presence of the prisoner, the cause comes on to be heard and is fully heard by the court on the motion for new trial on the ground of newly discovered evidence, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid.

On the twelfth day of February, A. D. 1897, after due consideration by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid, the motion for new trial on the ground of newly discovered evidence is, in the presence of the prisoner, denied.

On the fourth day of March, A. D. 1897, the defendant in person presents the following bill of exceptions for allowance in open court, and there being no objections thereto the same is signed and allowed by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid, and thereupon the same is ordered to be entered of record.

45 United States of America. Circuit court of the United States, district of Massachusetts.

UNITED STATES
v.
THOMAS BRAM, ALIAS. } No. 1790.

Before Circuit Judge Colt and District Judge Webb.

BILL OF EXCEPTIONS.

Be it remembered, that the barkentine "Herbert Fuller" sailed from Boston on the 2nd day of July, 1896, bound for Rosario, on the river

Platte above Buenos Ayres, South America, with a cargo of lumber under and on deck.

She had on board a captain, Charles I. Nash; Bram, the defendant; a second mate, August W. Blomberg; a steward, and six seamen; also the captain's wife, Laura A. Nash, and one passenger, Lester H. Monks.

The vessel proceeded on her course toward her port of destination until the night between July 13 and July 14. On that night at 12 o'clock the second mate's watch was relieved by the mate's watch, of which Bram, the defendant, was the officer in charge. The captain, his wife, the passenger, Monks, and the first mate and the second mate all lived in the aftercabin, occupying separate rooms. A draft of the aftercabin
46 is annexed as part of this statement of facts. The crew and the steward slept forward in the forward house.

When the watch was changed at midnight, Bram, the defendant, took the deck, the seamen Loheac and Perdok went forward on the lookout, and Charles Brown, otherwise called Justus Leopold Westerberg, his true name, took the wheel, where it was his duty to remain till two o'clock, at about which time he was relieved by Loheac. The second mate went to his room and the seamen of his watch to their quarters at twelve midnight, and there was no evidence that any of them or the steward appeared again till daylight.

The passenger, Monks, who occupied a room on the starboard side of the cabin, between the chart room where the captain slept and the room on the forward starboard side where Mrs. Nash slept, with doors opening from the passenger's room into both the chart room used by the captain as his room and that of Mrs. Nash, was aroused not far from two o'clock—the exact time is not known, as he says—by a scream and by another sound characterized by him as a gurgling sound. He arose, went to the captain's room, and found the captain's cot overturned and the captain lying on the floor by it. He spoke, but got no answer; put his hand on the captain's body and found it damp or wet. He then went to Mrs. Nash's room; did not see her, but saw dark spots on her bedding and suspected something wrong. He went on deck and called the mate, the defendant, telling him the captain was killed. Both went below, took down the lantern hanging in the main cabin, burning dimly, turned it up and went
47 through the captain's room to the passenger's room, and the passenger there put on a shirt and pantaloons. They then both returned to the deck, the mate on the way stopping a brief time in his own room. Bram and Monks remained talking on deck till about daybreak, when the steward was called and told what had happened. Up to this time no call had been made for the second mate, nor had anyone visited his room. Later it was found that Captain Nash, his wife, and Blomberg, the second mate, were all dead, each with several wounds upon the head, apparently given with a sharp instrument like an axe, penetrating the skull and into the substance of the brain, and the second mate lying on his back with his feet crossed, in his berth; Mrs. Nash in her bed, in her room, and at the back side of the bed, and Captain Nash in his room, as already stated.

The whole crew was called at or about daylight, and were informed of the deaths.

The bodies were removed from the cabin and placed in the jolly boat, and the boat was towed astern to Halifax. The cabin was then locked,

Bram taking the keys, and it remained locked till the vessel reached Halifax.

At first after the discovery of the murders there was some hesitancy as to where the vessel should go. At the defendant's suggestion she was headed to go to Cayenne, in French Guiana, but the plan was changed and she steered for Halifax, Nova Scotia, where she arrived July 21, and was taken possession of by the local authorities at the instance of the consul-general of the United States.

48 At first after the discovery of the murders, Bram on whom had devolved the command of the ship, made Brown chief mate and Loheac second mate.

No blood or spots of blood were ever discovered on the person or the clothing of any person on board, nor did anything direct suspicion to anyone.

In a day or two, suspicion having been excited in respect to the seaman Brown, the crew, under the supervision of Bram, seized him, he not resisting, and put him in irons. All the while the officers and seamen remained on deck. Bram navigated the ship until Sunday before they reached Halifax on Tuesday, and after the land of Nova Scotia was in sight, when, Brown having stated to his shipmates, or some of them, that he saw into the cabin through a window in the afterpart and on the starboard side of the house, and saw Bram, the mate, kill the captain. In consequence of this statement of Brown, the crew, led by the steward, suddenly overpowered the mate and put him in irons, he making no resistance, but declaring his innocence. Bram and Brown were both carried into Halifax in irons.

At Halifax all the officers, the crew, and the passenger were examined before the American consul, and gave their statements, which were reduced to writing and sworn to.

All were kept in confinement at Halifax, and Bram was brought before one Powers, a local official detective, and was searched by him and conversation was had with him.

Subsequently the crew, including Bram and Brown and the pas-
49 senger, Monks, at the request of the United States authorities, were sent by steamer direct from Halifax to Boston, and there delivered to the authorities, who lodged them all in jail.

Upon complaint of the United States district attorney, and hearing thereon before a commissioner of the United States circuit court, Bram and Brown were committed to await the action of the grand jury, and all the witnesses except Monks, the passenger, and Spencer, the steward, were restrained in jail, being unable to furnish bail.

When the grand jury were in attendance, Brown was called as a witness before them. Bram did not testify before the grand jury.

Bills of indictment were returned against Bram for the murders of Captain Nash, Mrs. Nash, and the second mate, Blomberg.

No indictment was found against Brown.

At the United States circuit court begun and held at Boston, in the district of Massachusetts, on the fifteenth day of October, A. D. 1896, to wit, on the twenty-ninth day of October, A. D. 1896, the grand jury returned an indictment against Thomas M. Bram for the murder of Charles I. Nash and Laura A. Nash, on the fourteenth day of July,

A. D. 1896, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of said court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller."

The said indictment was in the words and figures following, viz:

50 The United States of America.

At a circuit court of the United States of America for the district of Massachusetts, begun and holden at Boston, within and for said district, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-six.

The jurors for the United States of America within and for the district of Massachusetts, upon their oath present that Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Charles I. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and

51 out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain axe, him the said Charles I. Nash in and upon the head of the said Charles I. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Charles I. Nash in and upon the head of the said Charles I. Nash divers mortal wounds of which said mortal wounds the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought him the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

52 And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Charles I. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on

53 board of said vessel, with a certain sharp instrument, the name of which and a more particular description of which are to said jurors unknown, him the said Charles I. Nash in and upon the head of the said Charles I. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Charles I. Nash in and upon the head of the said Charles I. Nash divers mortal wounds, of which said mortal wounds the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present, that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought him the said Charles I. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

54 And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid, for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid, do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom, and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura A. Nash an assault did make, and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain axe, her the said Laura A.

55 Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura A. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash divers mortal wounds, of which said mortal wounds the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder,

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

56 And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid, do further present that

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United Sates of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura A. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on

57 board of said vessel, with a certain sharp instrument, the name of which and a more particular description of which are to said jurors unknown, her the said Laura A. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura A. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura A. Nash divers mortal wounds, of which said mortal wounds the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura A. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

58 Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with force and arms, unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura R. Nash an assault did make;

59 and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain axe her the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash divers mortal wounds, of which said mortal wounds the said Laura R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and board of said vessel, died; and so the jurors aforesaid upon their oath aforesaid do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the juris-

60 diction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the United

States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

And the jurors aforesaid for the United States of America, within and for the district of Massachusetts, upon their oath aforesaid do further present that—

Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, mariner, of Boston, in said district of Massachusetts, on the fourteenth day of July, in the year of our Lord one thousand eight hundred and ninety-six, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of a certain vessel of the United States of America, to wit, the barkentine called the "Herbert Fuller," which said vessel was then owned by divers citizens of the United States of America, the names of whom and a more particular description of whom are to said jurors unknown, with

61 force and arms unlawfully, feloniously, wilfully, and of his malice aforethought in and upon one Laura R. Nash an assault did make; and that the said Thomas Bram, so otherwise called as aforesaid, then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, with a certain sharp instrument, the name of which and a more particular description of which are to said jurors unknown; her the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash unlawfully, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound thereby, then, and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Laura R. Nash in and upon the head, face, neck, breast, arms, hands, and other parts of the body of the said Laura R. Nash divers mortal wounds, of which said mortal wounds the said Laura R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, died; and so the jurors aforesaid, upon their oath aforesaid, do say and present that the said Thomas Bram, so otherwise called as aforesaid, unlawfully, feloniously, wilfully, and of his malice aforethought her the said Laura

62 R. Nash then and there, to wit, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid upon their oath aforesaid do further present and say that the said district of Massachusetts is the district of the

United States of America into which the said Thomas Bram, so otherwise called as aforesaid, was first brought after committing the offence aforesaid.

A true bill.

ALBERT L. BOWEN,
Foreman of the Grand Jury.

JOHN H. CASEY,
Assistant United States Attorney for the District of Massachusetts.

63 Before his arraignment upon this indictment, Thomas M. Bram, said defendant, duly filed a plea to the jurisdiction of the said court, and pleas in abatement; also a motion to quash, of which several pleas the following are true copies:

[Caption omitted.]

Plea in abatement.

Now comes Thomas M. Bram and moves that the indictment returned against him in said case be abated for the following reasons, to wit:

1. Because certain of the grand jurors who found and returned said indictment were not duly sworn before they considered the evidence against said defendant and returned said indictment into court.

2. Because certain of the said grand jurors who acted upon the evidence against the said defendant objected and refused to being sworn, but affirmed.

3. The indictment omits to allege that the same was found and presented upon the oath and affirmation of said grand jurors.

(Signed.)

64 THOMAS M. BRAM.

[Caption omitted.]

Supplementary plea in abatement.

And now comes Thomas M. Bram and moves that the indictment returned against him in said court be abated for the following reasons, in addition to those set forth in his plea in abatement heretofore filed in said cause, to wit:

Because one of the grand jurors who found and returned said indictment was not duly sworn before said grand jurors considered the evidence against said defendant and returned said indictment into court; and

Because one of the grand jurors who found and returned said indictment was permitted to affirm instead of being sworn, without stating and without being asked as to the fact that he was conscientiously scrupulous of being sworn.

THOMAS M. BRAM.

[Caption omitted.]

Motion to quash.

And now comes the defendant, after return of the indictment into court and before plea, and moves that the indictment in said case be quashed, and for the following reasons, viz:

1. Because the said indictment does not allege and charge any offence with sufficient certainty and precision.

2. Because the said indictment is vague and uncertain.

65 3. Because different counts are improperly joined or included in same indictment.

4. Because certain of the grand jurors who found and returned said indictment were not duly sworn before they considered the evidence against said defendant and returned said indictment into court.

5. Because certain of the said grand jurors who acted upon the evidence against the said defendant objected and refused to being sworn, but affirmed.

6. The indictment is defective in omitting to allege that said indictment was found and presented upon the oath and affirmation of said grand jurors.

THOMAS M. BRAM.

[Caption omitted.]

Plea to jurisdiction.

And now comes the said Thomas M. Bram, the defendant named in the indictment found in the above entitled case, and says that the said court ought not to take cognizance of the crime in the said indictment above specified, because, protesting that he is not guilty of the same, nevertheless, the said Thomas M. Bram says that the said district is not the district wherein said defendant was found or into which he was first brought after the commission of the offence set forth in said indictment; and this the said Thomas M. Bram is ready to verify; wherefore he prays judgment if the said court will or ought to take cognizance

66 of the indictment aforesaid; and that by the said court he may be discharged.

THOMAS M. BRAM.

[Caption omitted.]

Defendant's affidavit in support of his special pleas and motion.

I, Thomas M. Bram, the defendant in the above entitled causes, on oath depose and say that I believe, and have reason to believe, that the facts alleged in said pleas are true.

THOMAS M. BRAM.

The above was duly sworn to on Nov. 12, 1896.

The aforesaid plea to the jurisdiction was withdrawn by the defendant after argument upon the several pleas aforesaid, and the motion to quash, but before any ruling upon any of them by the court.

Thereupon, at the hearing of the pleas in abatement, it appeared that when the grand jurors were empanelled, one of them, being one of the panel who found said indictment, upon being called to be sworn, stated that he affirmed and declined to take an oath, and after his fellows had been regularly sworn he was formally affirmed to the same duties specified in the oath administered to the others.

The court ruled upon and overruled the pleas in abatement and motion to quash as follows:

67 "It is first to be noted that this plea itself sets out that the jury were either qualified by taking an oath or were qualified by

taking an affirmation, so that any suggestion that appears on the face
the plea, or in argument, that any person not properly qualified a
authorized was admitted to the grand jury room and took part in th
deliberation, and joined in the action of the grand jury in returning t
indictment into court, is negatived by the plea itself.

"The suggestion of the district attorney that the jury consisted
twenty-one members, as it is by record, and that by law the concurren
of only twelve is necessary for the return of a valid and sufficient indi
ment, we do not hold a valid argument, because we are of opinion th
if it were shown to us that any stranger to a legally and properly co
stituted grand jury was admitted to its deliberations and was prese
while they conferred together upon the evidence and upon the propri
of returning a bill of indictment the whole proceeding would be ba
It would be impossible for the court or anybody to measure the infl
ence of that stranger upon his fellows in the grand jury room, an
especially in a capital case the court should take no risks by an assump
tion that those who concurred were all properly qualified to act, nor d
we perceive how that fact itself could be shown except by calling all th
grand jury and putting every one upon his oath to determine what pa
he took in the return of this indictment.

"But we hold further that under the Statutes of the Unite
68 States, adopting by reference the law of the State of Massachusetts
the requirement of an oath is satisfied by the taking of an affirmatio
in judicial or legal form. The exact words of the statute we will quote
'By making affirmation in judicial form.' Nor do we hold it necessar
for the record to show just the circumstances under which the juror wa
admitted to affirm. Were it necessary so to decide, which it must b
understood we do not find it necessary to do, and therefore do not decide
we should be inclined to the view that where an affirmation is adminis
tered to a grand juror upon his own objection to taking an oath in th
presence of a court and with the consent of the presiding justice, n
objection being made at the time, it is to be presumed that the affirmatio
was properly administered to him and for proper reasons.

"The section of the statute of Massachusetts which says: 'Person
having conscientious scruples may be allowed to affirm instead of taking
an oath,' provides no way by which the court can determine his conscien
tious scruples. It must depend upon his own assertion. We know of
no way by which the conscience can be searched by evidence to contradict
the statement he himself makes in regard to his scruples, and the sug
gestion that the right to take the affirmation instead of an oath is not
wholly discretionary with the party who asks the privilege is more plausi
ble than real, because the party has the discretion to declare his scruples
and as to the privilege the court has nothing to do but allow it under the
statute.

69 "But we do not dispose of this part of the case upon that ground.
We regard the objection as falling clearly within the provisions of
section 1025, Revised Statutes, which holds and declares that 'No indict
ment found and presented by a grand jury in any district or circuit or
other court of the United States shall be deemed insufficient, nor shall a
trial, judgment, or other proceeding thereon be affected by reason of any
defect or imperfection in matter of form only which shall not tend to the

prejudice of the defendant.' And we do not readily conceive of any matter which can be more a matter of form than the mere declaration in the indictment returned by the grand jury that they were acting under oath. We believe that they were within the law acting under oath in this case. But the more conclusive reason for our decision is that this is a purely formal objection, which can in no way prejudice him in making his defence. The defence comes upon other matters altogether.

"I am reminded that by statute an affirmation in judicial form answers all the requirements of an oath, and we must therefore hold that this indictment setting out that the jury were acting under oath would be strictly sufficient to include the case of parties some of whom affirmed instead of taking an oath.

"We have thus far gone over all the points in the plea in abatement, and the result is the plea is overruled and the party will be held to answer to the indictment.

"Now comes the motion to quash; but before proceeding further in these matters we wish to say that we have not been unmindful
70 of the district attorney's motion to dismiss all these pleas and motions, but in view of the somewhat irregular manner in which we grouped all these questions together, and heard the whole matter together, we deemed it better to examine the merits of the motion and pleas, the result of which will be the same thing in the effect upon these proceedings as if we had considered the motion (of U. S. attorney to dismiss). It is a somewhat irregular proceeding to allow a motion to dismiss a plea—although there is an authority for so doing—rather than to have the plea demurred to and overruled at the proper hearing. We have taken no action, therefore, upon the grounds of the motion of the district attorney.

"The motion to quash is upon these grounds: 'Because said indictment does not allege and charge any offence with sufficient certainty and precision.' Neither in the argument nor in the motion are we sufficiently instructed as to where this supposed lack of precision appears. The second is only a repetition of the same in other phraseology: 'Because said indictment is vague and uncertain.'

"Now, upon careful inspection of both indictments (N. B. The pleas and motion were urged against two indictments; the one on which a trial was had and one on which no trial has been had), which I hold here, having obtained them from the clerk this morning to make a final examination of them, we do not find that objection supported. The indictment sets out the name of the defendant; it sets out the place of the commission of the supposed offence; it sets out the time in which it was com-
71 mitted; it sets out the person upon whom it was committed; it sets out the manner in which and the means by which it was committed; it sets out the malice for its commission and by proper terms of art includes all the expressions necessary for an indictment in a capital case; it sets out the death in consequence of the use of those means; and it sets out—which in any branch of the case is not passed upon—the jurisdiction of the court, and it sets out that this is the district into which the party was brought, and where the trial under the statute must be had. We do not see any vagueness or uncertainty in the indictment, so that we can not support that ground of the motion.

"Third. 'Because different counts are improperly joined or included in the same indictment.' The argument proceeds upon the basis and theory that while such a joinder of different offences and of different counts is permissible only in cases of misdemeanor it is not so in regard to felonies. It is to be observed that the statute of the United States, which not only allows but practically requires the district attorney so to join counts, makes no discrimination between misdemeanors and felonies. The language of the statute is: Acts or transactions connected together, or two or more acts or transactions of the same class of crimes or offences (not misdemeanors), and is broad enough to include both misdemeanors and felonies. (Section 1024 of the Revised Statutes.) Moreover, we think it sufficiently appears in the indictment that these crimes or offences or acts were of the same class and were so connected together. These
72 transactions are alleged in every count to have happened on the same day and in the narrow space of a vessel upon the high seas. The charge is murder in every count. It is averred to have occurred at the same place and at the same time, and the locus in which the offences, if any, were committed is, as I said, within the narrow limits of a vessel upon the high seas.

"Moreover, the decision of the Supreme Court of the United States, which I handed to counsel yesterday, in the case of McElroy v. United States, delivered at this present October term, 1896, of the Supreme Court, deals with this very question and holds that the permission to join or the requirement of the attorney or prosecutor to elect is largely a matter of discretion for the court.

"We do not approve of the practice of uniting in one indictment charges for two distinct capital offences, and we should be disposed in this case, upon proper motions at a later time, to call upon the district attorney to narrow his prosecution to a single charge, which might be done either by election or, better still, by a nol pros of the counts which relate to one of the two persons alleged to be (have been) killed. There are reasons for such a course, looking to public interests. There are also reasons for such a course, looking to the full protection of the defendant, but as a motion to quash, we do not think the grounds sufficient.

"The motion then proceeds: As to the averments 4, 5, and 6, with regard to the oath or affirmation of the grand jurors and the failure to set out in the indictment that there was oath and affirmation, we
73 have sufficiently treated that in what has been said with regard to the pleas in abatement. It will not be repeated. The ground does not strike us as tenable.

"In the argument in support of the motion to quash and pleas in abatement, the argument does not confine itself systematically to the several points, but they have been mixed together. The same objection applies to the lack of proper averment of time and place, and the objection runs to the whole of the counts; not to some specific count, but to every count.

"Now, it is familiar law that in a criminal proceeding it is incumbent on the Government to aver with regularity and distinctness both time and place. It is also familiar law that it is never compelled to prove

time and place exactly as averred, except when time and place enter into the substance of the offence. Place here does enter into the question of jurisdiction; time does not. It should appear in the course of the trial that the actual time of the occurrences was not affected by the statute of limitation.

"No suggestion whatever has been made here that whatever took place on board this barkentine Herbert Fuller, whereby certain persons lost their lives, is not within the period in which the prosecution is allowed. An inspection of the indictments and of the several counts in them shows beyond all peradventure that the Government in its indictment has exactly, explicitly, and clearly alleged, wherever such an allegation is required, a time and a place. It is true that there has been greater particu-
74 larity in setting out the place than in setting out the time, but the averment of time refers to an earlier and distinct declaration of the day, and each count commences with an averment that on the fourteenth day of July, 1896, at a place on the high seas, on board an American vessel, out of the jurisdiction of any particular State and within the jurisdiction of this court, certain things were done. Thereafter when it refers to time and place it uses the common form of expression 'then and there,' and expands the word 'there' without an expansion of the word 'then.' It certainly could not impair the sufficiency of the averment of time by reference of the word 'then' because he saw fit not to rely upon the word 'there' as a sufficient reference to place, but explains what should be meant by that. So we think there is nothing in this objection.

"The result of our deliberation of the hearing is that the motion to quash is overruled, the pleas in abatement are overruled, the plea to the jurisdiction has not been before us—that is to say, in the final action it has been withdrawn and is not before us—and it then only remains for the defendant to plead to the indictment, and he should at this time be arraigned, unless for good cause shown a later day is fixed. It is the purpose of the court to have the arraignment at this time unless, as I say, good reason for postponement is shown; and then to arrange a day at which the trial shall proceed without interruption until the whole matter is disposed of."

The defendant thereupon excepted to the court's conclusions as to matters of law as to the matter of the plea in abatement, and especially that which referred to the qualifications of the grand juror Merrill—
75 the juror who affirmed—and to the fact that it did not appear that he had conscientious scruples against taking an oath. The defendant also excepted to the court's conclusions as to the matter of law as to the improper joinder of counts in the indictment without an averment that they referred to the same transaction or the same occurrences. And his exceptions were allowed.

The defendant was then arraigned and pleaded that he was not guilty. The court then assigned December 14, 1896, as the day for the trial.

On the said 14th day of December, before any proceeding towards empanelling a jury to try this indictment, the United States district attorney informed the court and the defendant that the Government entered a nolle prosequi to the third, fourth, fifth, and sixth counts in the indictment, the same being all the counts charging the murder of

Laura A. Nash, and would proceed only on the first and second counts, charging the murder of Captain Charles I. Nash, and the attorney had duly indorsed the said nolle prosequi on the indictment.

Then followed proceedings to empanel a jury for the trial.

On September 26, 1896, before the beginning of the October term of this court, the court ordered that venires issue for twenty-three grand jurors and for fifty-one petit jurors, to attend and serve at the term of said court to be begun and held on the 15th day of October, 1896.

On the 17th day of November, 1896, an order was made by the court as follows:

76 "Ordered, that venires issue for one hundred additional petit jurors, to come in on Monday, the fourteenth day of December next, at ten o'clock a. m., from the several cities and towns named in Table No. 50, and apportioned as follows, namely: Boston, sixteen; Adams, nine; Cambridge, fourteen; Woburn, thirteen; Nantucket, nine; Hyde Park, nine; Chatham, nine; Stoneham, nine; West Newbury, nine; Plainfield, three."

The venire for such additional jurors from Cambridge failed to be served and no additional jurors were summoned from the city of Cambridge, nor attended on the 14th day of December, but the two jurors from the city of Cambridge already in attendance on the court pursuant to the venires issued on the order of September 26, 1896, were included in the array of jurors on said 14th day of December, which had been assigned for the trial. In the same way certain other jurors summoned and in attendance under the order of September 26 made part of the array on December 14, 1896.

Before the empanelling of the jury for his trial the defendant filed the following challenge to the array:

77 [Caption omitted.]

Challenge to the array and especially to the persons substituted for the jurors ordered to be drawn from Cambridge.

And now comes Thomas M. Bram, the defendant named in said indictment, in his proper person, when the jury is about to be empanelled to try the issue in said indictment, and says that the said array is an illegal one, and that the order of this honorable court in reference to the drawing and apportioning of jurors for the trial of this case from different cities and towns in the district of this court in accordance with the provisions of section 802 of the Revised Statutes of the United States has not been compiled with, but has been evaded.

That at a session of this court on the 14th day of November, 1896, the district attorney for the United States for said district moved, in the presence of the defendant, in open court, that a special panel consisting of one hundred jurors be drawn, from which jurors were to be selected to try the defendant of the offence charged in said indictment. That the defendant, by his counsel, in open court assented to the said motion of the district attorney. Thereupon, on the 17th day of November, 1896, it was ordered by the court that venires issue for one hundred additional jurors to come in on Monday, the 14th day of December, 1896, at 10

o'clock in the forenoon, from the several cities and towns named in Table No. 50, and apportioned as follows, viz:

Boston, sixteen; Adams, nine; Cambridge, fourteen; Woburn, thirteen; Nantucket, nine; Hyde Park, nine; Chatham, nine; Stone-
78 ham, nine; West Newbury, nine; Plainfield, three.

That the defendant expected that this order of the court would be complied with. That he is advised it was his right, and he desired, and still desires, to be tried by a jury drawn pursuant to that order. That it now appears by the list of jurors presented to the defendant that the apportionment materially differs from said order of the court, and that by said present list the jurors are unjustly and against the interest of the defendant apportioned, as follows, viz:

Boston, seventeen; Adams, eleven; Cambridge, two; Woburn, twelve; Nantucket, nine; Hyde Park, nine; Chatham, eleven; Stoneham, ten; West Newbury, twelve; Plainfield, four.

That the apportionment on said list now before the defendant is contrary to the order of this court and in violation of section 802 of said Revised Statutes.

1st. Because no jurors were drawn from the city of Cambridge under said order of this honorable court of November 17th, 1896. That a larger number of jurors appears upon the list now before the defendant from the towns of Chatham, West Newbury, Plainfield, Stoneham, and Adams than was stated or authorized in said order of November 17th.

2nd. Because the following-named persons upon said list, to wit: Solomon C. Atwood, Theophile Brodeur, Martin Best, T. Weston Bryant, George O. Baird, Elijah Ball, Oliver J. Briggs, James N. Benjamin, James Buckley, Albert Brown, Oliver E. Eldridge, Nelson A. Newhall,
Parker H. Nason, and Arthur A. Norcross have been summoned
79 and have discharged duties as jurors in this court within less than one year of the time assigned for the trial of the defendant, and were not drawn or summoned to attend this special sitting of this court pursuant to said order of November 17th, 1896.

3rd. Because the fourteen jurors last named were without right and without the knowledge or consent of the defendant substituted for the fourteen persons which this court by its order of November 17th ordered to have drawn and returned from the city of Cambridge, and the defendant now objects to such substitution as a violation of his legal rights.

4th. Because the list of jurors now presented to the defendant contains the names of persons not residing within the several cities and towns named in Table No. 50, and in said order of this court, dated November 17th, 1896.

5th. That a meeting of the board of aldermen of said city of Cambridge was called for Monday, the 7th day of this month, for the purpose of drawing jurors pursuant to said order of this court. That on said 7th day of December, after notice had issued for said meeting of the board of aldermen of said Cambridge, and before the arrival of the hour for which said meeting had been called, an official of the United States notified the clerk of said city of Cambridge that it would not be necessary to hold said meeting, as no jurors would be needed from said Cambridge, and consequently none were drawn from that city.

6th. Because the venires on which said jurors were drawn were not properly served or by persons qualified to serve the same.

80 All the foregoing the defendant is ready to verify.

And so the defendant says that the persons named in said list do not constitute a legal jury; that the order of this court was not complied with; that the jurors are not apportioned in such a manner as to be just to the defendant; and this he is ready to verify.

THOMAS M. BRAM.

In support of said challenge to the array the defendant called attention to the aforesaid order of November 17th that venires should issue for additional jurors. His counsel also stated that no other order relating to the jurors had since been issued, except the following order, made by Judge Aldrich at a time when the defendant was not present, and had no knowledge that the order related in any way to this indictment or to his trial:

"Ordered, that jurors now present, not in case No. 473, be excused until Monday, December 14, 1896, at ten o'clock a. m., namely: Solomon C. Atwood, Theophile Brodeur, Martin Best, T. Weston Bryant, George O. Baird, Elijah Ball, Oliver J. Briggs, James N. Benjamin, James Buckley, Albert Brown, Oliver E. Eldridge, Nelson A. Newhall, Parker H. Nason, and Arthur A. Norcross."

The defendant further introduced the following affidavit of Edward J. Brandon:

81 "I, Edward J. Brandon, of the city of Cambridge, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say: That I am, and was on the 7th day of December, 1896, clerk of said city of Cambridge; that on said 7th of December instant I was called to the telephone by a gentleman who gave his name as Mr. Sherman Hoar, United States attorney for said district, and who asked me if jurors had been drawn to serve in said court. I replied that no venire had been received. Mr. Hoar said that a venire had been sent November 23rd last, to which I answered that I had not received it. Later in the same day I was called to the telephone by a person claiming to be Henry W. Swift, esquire, United States marshal for said district, who inquired as to the drawing of said jurors, and I said to him also that no venire had been received. Mr. Swift thereupon said that a venire would be sent to Cambridge by two o'clock that day, and at his (Mr. Swift's) request an extra session of the board of aldermen of said Cambridge was called to meet at four o'clock of the same day for the purpose of drawing jurors. Later in the day a message came to the city messenger by telephone, purporting to be from Mr. Swift, that no venire would be sent to Cambridge and that no jurors need be drawn.

"The notice for said proposed meeting of the aldermen was thereupon countermanded.

"All the foregoing conversations and messages were substantially in the language herein used.

"EDWARD J. BRANDON."

This affidavit was duly sworn to.

82 It appeared that the grand venire issued under the above-named order of the court bore the following return:

"Grand venire, United States of America, district of Massachusetts, Boston, December , 1896. In obedience to the within precept I have caused eighty-six good and lawful men to be summoned to serve as petit jurors, to come before the October term, 1896, of the circuit court, now holden, mentioned in the nine venires committed to me at the same time with this precept for distribution, and the names of the persons returned to me by virtue of said venires are herewith returned to court. The venire for Cambridge was not served.

"HENRY W. SWIFT,
"*United States Marshal.*"

The defendant also called the attention of the court to section 803 of the Revised Statutes, and to the fact that from inspection of all the subordinate venires in the case it appeared that they were all served by constables of the respective towns, and not by the marshal or any of his deputies, nor by any person designated in section 803 of the Revised Statutes.

The Government in opposition to the challenge introduced another affidavit of Edward J. Brandon, as follows:

"I, Edward J. Brandon, clerk of the city of Cambridge, hereby certify that no venire from the circuit court of the United States, dated Nov. 17, 1896, for the choosing and appointing of fourteen jurors from Cambridge to appear in said court on Dec. 14th, 1896, has been served upon me as clerk of the said city, and that no venire whatever for the sum-
83 moning of jurors for the said court has been served on or since the aforesaid 14th of December.

"Attest:

"EDWARD J. BRANDON."

It appears from the return of the venire issued for the summoning of jurors from Cambridge that the constable to whom it was delivered did not serve the venire upon the city clerk, but undertook to select jurors himself.

It appeared from the record that with the jurymen previously summoned, and in attendance on the court, there were more jurymen present from certain towns than had been ordered in the order of November 17 for the issue of venires.

The attorney for the Government filed a replication to the challenge as follows:

[Caption omitted.]

Replication to the challenge to the array.

And thereupon Sherman Hoar, attorney for the United States of America for the district of Massachusetts, who prosecutes for said United States of America in this behalf, says that by reason of anything in said pleading by Thomas Bram alias alleged, the said United States of America ought not to be precluded from prosecuting said indictment against the said Thomas Bram alias, because he says:

First. That said jury was impartially drawn according to the laws of said United States of America.

Second. That said jury was not selected by design, but was
84 drawn impartially, as aforesaid.

Third. That a larger number of jurors does not appear upon the list before the defendant from the towns of Chatham, West Newbury, Plainfield, Stoneham, and Adams than was stated and authorized to be drawn from said towns by orders of this honorable court.

Fourth. That the jurors specially named in the list in specification two in the defendant's challenge to the array were regularly summoned as jurors in this court for the present October term therof, and are liable for service, and are now attending said term of court, and not engaged in any other trial, and are properly liable to be called as jurors for the trial of said defendant.

Fifth. That the fourteen jurors above-mentioned have not been substituted for any other fourteen persons which this honorable court by its order of November 17th ordered to have drawn and returned from the city of Cambridge.

Sixth. That the list of jurors now presented to the defendant contains no names of persons not residing within the several cities and towns named in Table No. 50.

And this the said Sherman Hoar is ready to verify. Wherefore he prays judgment, and that the said Thomas Bram may be required to go before said jury.

SHERMAN HOAR,
U. S. Attorney.

85 The court held that the challenge must be tried by the court, and found that the objection to the apportionment of jurors as contrary to the order of court and in violation of section 802 of the Revised Statutes was not well taken. The court also found that the marshal, pursuant to a grand venire issued on the 26th day of September, 1896, summoned a number of jurors; that those jurors attended, and continued in attendance, and were in attendance on the 14th of November, on which date the order for additional jurors was issued; that said jurors were a part in fact and in law of the regularly summoned jurors to attend and do jury service at this current term of the court; that their presence at this time to make up the number from which a jury may be empanelled is in no sense a substitution for anybody else, and that they are as regularly summoned and attending as those who have been summoned pursuant to the venires ordered on the 17th day of November. With respect to the jurors alleged to have served and discharged duties as jurors within less than one year of the time assigned for the trial of the defendant, the court ruled that said jurors had been drawn to attend this term of said court and were still in attendance upon it. The fourth ground of challenge was waived by the defendant so far as concerned the challenge to the array. Upon the fifth ground of challenge the court ruled that "The neglect of the constable of Cambridge, to whom was committed the venire regularly issued under the seal of this court, was no ground for challenging the array." The court overruled the sixth objection, and ruled that the venires had been prop-
86 erly served, except that which ran to Cambridge, that the challenge to the array could not be supported, and that the jurors had been

legally and properly drawn, summoned, and returned, and were fit to be empanelled to try the case.

To all the foregoing rulings the defendant seasonably excepted, and his exceptions were allowed.

Upon the examination of Juror Solomon C. Atwood upon the voir dire, the juror testified that he was one of the jurors who had been summoned for the regular term of said court and was still in attendance. The juror was then challenged for the cause that he was not one of those who had been summoned upon the special venires for additional jurors, but was one summoned earlier in the term and had rendered service at an earlier part of the term. It was proved that this juror had not been excused, but was still in attendance. The challenge for cause was overruled and disallowed. Exception was taken and allowed to this ruling.

This juror was then peremptorily challenged.

The Juror Martin Best was challenged for cause, with the facts relating to him precisely the same as those relating to Solomon C. Atwood, and this challenge for cause was likewise overruled and disallowed. The defendant excepted and his exception was allowed.

The juror was then challenged peremptorily.

When the panel was complete, it appeared that the defendant had not exhausted all his peremptory challenges.

87 Robert N. Leahan, a witness called for the prosecution, testified that he boarded the "Herbert Fuller," Tuesday morning, July 21, 1896, in the port of Halifax; that he went into the after cabin and observed the doors.

He was asked by the prosecution: "Will you describe how you found the door between the room marked 'Passenger' and the room to the rear of it there?" [The diagram of the vessel was shown to the witness.] Whereupon the following occurred:

Ans. Do you mean the captain's room or his wife's room?

DEFENDANT'S ATTORNEY. I wished to object before that answer.

DISTRICT ATTORNEY. Do not answer until it is ruled upon. Look at that plan, please.

WITNESS. Which is the cabin?

DISTRICT ATTORNEY. Look at the room marked 'Passenger.' Now, did you observe the condition or the position of the door between that room and this room here? [Indicating.]

WITNESS. Mrs. Nash's room?

ATTORNEY. Mrs. Nash's room.

WITNESS. Yes, sir; it was locked.

DEFENDANT'S ATTORNEY. I wished to object, but now that he has answered, I do not know that I can.

COLT, J. We think the question is admissible.

WEBB, J. It has already appeared in evidence that very soon after this transaction aboard the ship the cabin was locked up and kept locked, and your client had the key.

88 DEFENDANT'S ATTORNEY. What the condition was a week or nine or ten days afterwards—well; as it is, the witness having answered it, my exception is saved.

WEBB, J. You gave proper notice. The court has not ruled. It rules upon your suggestion to strike the answer out. We understand you to ask to have that answer stricken out.

DEFENDANT'S ATTORNEY. Yes, your honor.

WEBB, J. Because it was answered pending your objection, the motion to strike out is denied, and your exception is allowed.

Further questions as to other doors were asked the witness and were excluded, and the court ruled as follows:

COLT, J. The court, upon the whole, is of the opinion that proper foundation for this class of evidence has not been laid.

WEBB, J. The Government has not undertaken to show after these doors were locked on the morning after the murder—the cabin was closed and the keys given to Bram—whether there was any opening again until they arrived at Halifax, nor after the arrival at Halifax how soon the inspector of police, or whatever his title is, came on board—the chief of police came on board, and when they were first unlocked. Had that been done, this evidence we believe admissible. But in the absence of evidence of that sort, evidence on that point, we on the whole conclude that this present examination can not be justified, and also that our ruling with regard to the door between the passenger's and Mrs. Nash's room was mistaken and should be reversed, and the
89 jury instructed to disregard the statement of this witness that he found the door locked.

This was all said in the presence and hearing of the jury, but they were not otherwise instructed on the point.

Nicholas Power, of Halifax, called by the Government, testified that he was connected with the police department of Halifax, and had been for thirty-two years, and for the last fifteen years of that time as a detective officer; that after the arrival of the "Herbert Fuller" at Halifax, in consequence of a conversation with Charles Brown, he made an examination of Bram, the defendant, in the witness's office in the city hall at Halifax, when no one was present besides Bram and the witness. The witness testified that no threats were made in anyway to Bram, nor any inducements held out to him.

The witness was then asked:

"What did you say to him and he to you?"

To this the defendant's counsel objected. The defendant's counsel was permitted to cross-examine the witness before the court ruled upon the objection, and the witness stated that the conversation took place in his office, where he had caused the defendant, Bram, to be brought by a police officer; that up to that time the defendant had been in the custody of the police authorities of Halifax, in the custody of the superintendent of police, John O. Sullivan; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that at his office he stripped the defendant and examined his clothing, but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant
90 was then in custody and did everything the witness directed him to do; that the witness was then a police officer acting in his official capacity; that all this took place before the defendant had been examined before the United States consul, and that the witness did not

know that the local authorities had at that time taken any action, but that the defendant was held for the United States—for the consul-general of the United States.

The witness answered questions by the court as follows:

Q. You say there was no inducement to him in the way of promise or expectation of advantage?

A. Not any, your honor.

Q. Held out?

A. Not any, your honor.

Q. Nor anything said, in the way of suggestion to him that he might suffer if he did not—that it might be worse for him?

A. No, sir; not any.

Q. So far as you were concerned it was entirely voluntary?

A. Voluntary, indeed.

Q. No influence on your part exerted to persuade him one way or the other?

A. None whatever, sir; none whatever.

The defendant then renewed his objection to the question, what conversation had taken place between Bram and the witness, for the following reasons: That at the time the defendant was in the custody of the chief of police at Halifax; that the witness in an official capacity
91 directed the police authorities to bring the defendant as a prisoner to his private office and there proceeded to take extraordinary liberties with him; he stripped him; the defendant understood that he was a prisoner, and he obeyed every order and direction that the witness gave. Under these circumstances the counsel submitted that no statement made by the defendant while so held in custody and his rights interfered with to the extent described was a free and voluntary statement, and no statement as made by him bearing upon this issue was competent.

The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions were allowed.

The witness answered as follows:

"When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies."

92 Q. Anything further said by either of you?

A. No; there was nothing further said on that occasion.

The direct examination of this witness was limited to the interview between the witness and the defendant, Bram.

On cross-examination of the witness Power, he testified that at the time of the above-stated examination he took possession of a pair of sus-

penders belonging to the defendant, and kept the same in his office until the prisoners were coming to Boston—the whole crew and the passenger were imprisoned at Halifax, and sent as prisoners to Boston—when he handed them over to the Halifax superintendent of police, and they were sent to Boston, with other property of the defendant.

Defendant's counsel, upon the ground of showing interest on the part of the witness, then asked: "What other articles belonging to the defendant did you take possession of at that time?"

This line of inquiry was objected to by the district attorney on the ground that the matter was not opened on the direct examination, and the defendant could call the witness as part of his case if he saw fit. The court excluded the inquiry, ruling that it was not proper cross-examination and did not tend to show interest, and the defendant duly excepted and the exception was allowed.

There was evidence tending to show that Captain Nash, his wife, and the second mate were all murdered on the morning of July 14, between midnight and about 2 a. m., and that for hours before and after
93 their commission the barkentine "Herbert Fuller" was sailing on the starboard tack and under full sail; the wind was about two points abaft the beam, on the starboard quarter; that the sheets, especially the spanker sheets, were eased well off, and that the vessel was sailing at the rate of six or seven knots an hour.

Oscar Anderson, called by the Government, testified that he was an able seaman on board the "Herbert Fuller," a native of Sweden, twenty-five years old, and had followed the sea for a living since he was fourteen years old. He also testified that he had the wheel of the vessel from 4 to 6 o'clock of the afternoon before the murders, and was in the second mate's watch; and that "the vessel steered good, but you had to keep a sharp lookout; she was very quick on the wheel;" that he steered her. He was asked by the district attorney:

"If the vessel is on the starboard tack and under full sail, and the sheet is eased off, and the wind coming a point or two aft on the starboard quarter, and you take your hand off the wheel, what would happen to her?"

Defendant objected to the question on the ground that the witness was not qualified as an expert.

In response to questions by defendant's counsel he said that he had never left the wheel; that he never lashed the wheel, and that he did not know any more about the wheel of the "Herbert Fuller" than what he noticed when he was at it; that he never made any particular study of the wheel nor of the movements of the vessel.

In reply to questions by the court he said that he had stood his regular tricks at the wheel from the time of leaving Boston; that
94 he had steered the vessel a good many times under the conditions named in the question; that he sometimes had taken his hands off the wheel just for a moment; that if you leave the wheel for a moment the vessel would keep off or come up in the wind.

The court then admitted him to answer the question, overruling the objection, and the defendant excepted and his exception was allowed. The question being repeated the witness answered: "The vessel would either keep off or go in the wind."

Frank Loheac, called by the Government, testified that he was a native of France, twenty-five years of age, and had been at sea for eleven or twelve years; that he shipped on the "Herbert Fuller" July 3, 1896, and was in the first mate's watch; that he had the wheel just after the murder, from a little after 2 a. m. till 4 a. m.; that he steered the vessel once every day and once every night.

He was asked: "How did that vessel steer?" and answered: "She was pretty quick on her wheel."

To the question, "To keep her on her course, what did you have to do if you were at the wheel?" he answered: "You had to watch her sharp."

He was then asked: "If you were steering that vessel when she was sailing in a six or seven knot breeze, and she was under full sail on the starboard tack, with the sheets free and the wind coming a point or two aft on the starboard quarter, what effect would it have on the vessel? What would the vessel do if you took your hands off the wheel?"

95 The defendant objected, on the ground that there were not sufficient elements stated in the hypothetical question, and also upon the ground that it was not open to the Government at this stage of the proceedings to support their direct testimony by a hypothetical question. The objection was overruled and the question admitted, and the defendant excepted and the exception was allowed.

The witness answered: "She would either fall off or come to the wind, sir."

Henry J. Slice, called by the Government, an able seaman on the "Herbert Fuller," born in Germany, who had been going to sea sixteen years, and had shipped on this vessel July 3, 1896, and was in the second mate's watch, testified that on Monday night before the murders he was at the wheel from eight to ten o'clock; that the vessel "steered pretty fair;" that "she steered very fast;" that her wheel was a right-handed wheel and worked easy; that she had a lee helm; that with the sails up, if left alone at the wheel, she would come up to the wind.

He was then asked: "When the 'Herbert Fuller' was sailing with sheet well off, and all sails set, with the wind on the starboard quarter about two points abaft the beam on the starboard tack, what would be the effect on that vessel if you took your hands off that wheel?"

The same objection and upon the same grounds as made with regard to the testimony of Loheac was made to this question by defendant's counsel. The objection was overruled, and exception taken and allowed.

The witness answered: "She would come up to the wind, sir."

96 Hendrick Perdok, a Government witness, twenty-two years old, born in Holland, and who had been to sea for the last ten years, and who was one of the crew of this vessel in the capacity of ordinary seaman, and in the first mate's watch, and had been at the wheel from six to eight o'clock on the night of the murders, testified that he took his regular turn at the wheel; that "the wheel worked quite good;" that the wheel worked easy enough; that the vessel "steered good, so long as you looked all the time, but you must look out all the time, but you looked at the compass all the time and you could steer good."

He was then asked: "When the 'Herbert Fuller' was sailing, say, six or seven knots an hour, with the wind on the starboard quarter a

couple of points abaft the beam, and with the sheet of the spanker boom free, and all the sails on her set, what effect would it have on her if you took your hands off that wheel?"

To this question the same objections and exception were made as in the case of the preceding members of the crew, but it was admitted and defendant's exception was allowed.

The witness answered: "You take it off and the spanker must come over at the same time; if you took your hands off, the vessel would fall off and the spanker would want to go over to the leeward side—right over, if it stayed that way. If it was over on the port side, it would go over to starboard."

He was also asked: "Now, what effect would it have on that vessel under these conditions if you lashed that wheel?"

The same objections, and for the same reasons, were made to this question and were overruled.

97 Exception was taken and allowed.

The witness answered: "Just the same."

Q. "And when you were sailing under these conditions, how did you have to move that wheel?"

A. "Have to move it at all times a small bit."

Folke Wassen, a Government witness, one of the crew, in the capacity of ordinary seaman, a native of Sweden, age twenty-one years, and who had been following the sea for a living since 1893, was in the second mate's watch. He testified that he had the wheel from 10 p. m. to 12 midnight on Monday just previous to the murder, and that the ship steered very quickly.

He was asked: "Suppose the 'Herbert Fuller' was sailing the high seas at the rate of seven knots an hour, with the wind abaft the beam, on the starboard quarter, with the vessel on the starboard tack, with all sails set and the spanker sheet free, what effect would it have if you took your hands off that wheel?"

This question, under the same objections as before, was admitted, and exception saved and allowed.

The witness answered: "She would come up to the wind or keep off."

The defendant contended that said Charles Brown had equal opportunity with the defendant to commit said crimes. In support of this contention, the defendant introduced evidence tending to show that under the conditions existing at the time of the murders it would have

98 been possible for said Brown to have left the wheel lashed for a sufficiently long period to have enabled him to commit the murders.

The Government introduced evidence tending to show that Captain Nash was killed by a person standing over him, by his side, and about opposite his hip, and that this person struck him several blows on the head with an axe, which severed some of the arteries, and that the other persons killed bore wounds of a similar character to those of the captain.

Frank Winthrop Draper, a Government witness, for thirteen years a visiting physician of the Boston City Hospital; since 1878 had been teaching legal medicine in the Harvard Medical School, and since 1889 a professor of that department, and who in 1877 was appointed medical

examiner for Suffolk County, and as such had examined 4,680 cases, of which 1,022 had been autopsies, in response to a question by the district attorney as to the probable direction in which blood would flow or spout in case of a wound inflicted upon the head and severing the arteries, he testified that if the arteries were divided the direction from which a cut enters one of those arteries makes no difference as to the direction in which the blood will spurt from it, and that the blood would spurt in the direction from which it comes from the heart, namely, towards the arteries, or, in the head, towards the top of the head.

The witness was then asked, in substance: Whether, in your opinion, a man standing at the hip of a recumbent person and striking
99 blows on that person's head and forehead with an axe, would necessarily be spattered with or covered with some of the blood?

The defendant objected to the question and it was admitted and exception to its admission was allowed.

The answer was: "My answer is that, under the conditions framed in the question, the assailant in such a case would not necessarily receive blood spots upon his person or clothing."

THOMAS M. BRAM, the defendant, a witness at his own request, and in his own behalf, was sworn and testified.

The defendant on his direct examination was shown a book and testified in regard to it as follows:

Q. What is that book?

A. It is called a log book; it is a daily journal.

Q. Who kept that book or made the entries upon it?

A. This book is kept by the mate.

Q. You may look it through and see whether all the entries were made by you?

A. Yes, sir; all are in my handwriting.

Q. Are there any entries upon that book after you were put in irons?

A. Yes, sir; there was some notation made on the following days, a couple of days after that. I didn't pay much attention to the log book after we started on our way to Halifax. I brought the vessel here on the chart and there wasn't anything strange occurred, and of course I neglected it in making notations daily of what little there was.

100 Q. You say you find there were entries made after you were put in irons?

A. Oh, no, sir; not after I was put in irons. No, sir; there ain't nothing here.

Q. Well, are all the entries you find, all the writing upon that book, in your handwriting? I mean beginning, of course, with the time the vessel left Boston Harbor, when the entries were made?

A. Yes, sir.

Q. It is said to be on the 8th of July?

WEBB, J. The 3rd of July, isn't it?

DEFENDANT'S COUNSEL. The 8th day of July, when they sailed from Nantasket Roads, your honor.

WEBB, J. Well, his log began when he pulled out from port.

DEFENDANT'S COUNSEL. However that may be, I am not aware that there is any dispute about it.

Q. When did you begin to make entries?

A. I began to make entries on the morning of the 10th—the 10th of June, when I went aboard the vessel first.

Q. (By WEBB, J.) The 10th of June?

A. Yes, sir; I kept the diary of each day's work.

Q. (By DEFENDANT'S COUNSEL.) The first entry made by you, we understand, was on the 10th day of June?

A. Yes, sir; the day I went aboard.

Q. Now, between the 10th of June and the time you were put
101 in irons, do you find any entry—any entry made by any other person?

A. No, sir; nothing here visible.

Q. I wish you to state to the court and jury how that log book was kept.

A. This log book is a daily journal. The mate in charge of that ship is supposed to make a notation of all the things comes under his observation during the day's course, 24 hours; that is, of any importance. On this class of vessels—coasting vessels—we are not at all particular.

DISTRICT ATTORNEY. If your honors please——

COURT. That should be excluded.

DISTRICT ATTORNEY. I think he had better confine himself to how he kept that log.

WEBB, J. In the first place this vessel was bound on a foreign voyage.

Q. (By DEFENDANT'S COUNSEL.) You may speak about this particular book and how it was kept.

A. Well, this book—it is not correct; it is not supposed to be correct. It is only dead-reckoning—that is, the figuring part of it is only dead-reckoning, and dead-reckoning is only guesswork.

Q. I was going to ask you what you meant by dead-reckoning?

A. Well, dead-reckoning is a method used in navigating a vessel without observation of sun, moon, stars, or planet. It is guesswork.

102 Q. What is the other kind of reckoning than dead-reckoning?

A. The other—the other system for navigating a vessel—is navigation; different problems in navigation, which you are aided by a chronometer to find the longitude of the ship. We use the clock in working up stars' altitude, such as the north star, Aldebaran, or some other star. We generally take the time off the clock. But on this Herbert Fuller we hadn't these facilities for navigating a vessel. The captain had full control of the chronometer and up to the time of this murder we had, I think, two observations that was not to be relied upon, on account of the horizon being very hazy. The altitudes we took of the sun could not be relied upon.

Q. Why not?

A. For the simple reason that there was too much obstruction. We had not clear view of the level of the sea when we brought the sun down. There was too much haze along the horizon, and these positions that I made note here, on this log book, is only imaginary ones.

Q. What was the purpose of taking them?

A. Well, we are supposed to keep a daily run of the vessel as near as possible. I am not as accurate as I might have been on the log book

part. This is—the most important part of this log book is when any damage occurs to the vessel we are aboard of.

Q. What do you do in the event or case of damage occurring to the vessel?

103 A. Well, the captain generally inspects the log book on such occasions to see whether the language used in the log book is strong enough to test an insurance case protecting the owners of the vessel. If it is not, of course we generally fix it up to suit the captain's experience in regards to the circumstances.

Q. Now you may open the book. Do you find two loose leaves?

A. I do, sir.

Q. You may explain those.

A. On Saturday after the murder all probabilities were that we would get into Halifax by Sunday night. This was the Saturday before we got into Halifax. We got in on Tuesday. On Saturday before we got into Halifax the thought came to me, "We may be sent home to New York"—to Boston.

The COURT. State what you did.

A. I started to make duplicates of the occurrence from the 13th, "For the vessel may go away with the log book, and we won't have anything to guide by." Then realizing the nominal price of the log book, I discontinued the writing. That is why the leaves—probably two dates are together the same way here.

WEBB, J. He began to make duplicates?

WITNESS. Duplicates; yes, sir.

WEBB, J. And stopped it after a while?

WITNESS. And stopped it; yes, sir.

Q. Were you then in irons?

104 A. No, sir; this was on Saturday. I was put in irons on Sunday—Sunday about noon time.

WEBB, J. You say your dead-reckoning is all guesswork. Didn't you have something to guess by?

A. I took my reckoning on the speed of the vessel. I took the courses she was on.

Q. The courses she had been sailing?

A. Yes, sir.

Q. And the length of time she steered the several courses?

A. Yes, sir.

Q. You had some memorandum of that?

A. No, sir; I didn't keep a slate.

Q. You did it from memory?

A. Yes, sir.

Q. Did you or not, in order to get the reckoning, take into consideration the speed at which she was going and how long she had been on each course?

A. No, sir; I did not carefully do that. I kind of guessed the time of the different courses we sailed.

Q. Do you mean to say you navigated that ship by pure guesswork?

A. Not after the murder.

105 Q. No; I mean before.

A. Of course it was not all guess. Of course I used my experience with the ship, and so forth.

Q. You entered on the log book of the ship what you estimated the reckoning to be?

A. Yes, sir.

Q. Tell me the latitude and longitude of the ship the day before the murder?

A. The latitude and longitude—the figures is wrong here from what it was in the chart. The latitude 36 north on the morning of the 14th.

Q. What was it on the 13th? Don't take those loose sheets—take the fixed.

A. The 13th, 36° 07′—36° and 7 miles north, and the longitude 53° 25′ west.

Q. Did your log show that by dead-reckoning or by observation?

A. By dead-reckoning.

Q. You enter when the position is determined by dead-reckoning and when by observation?

A. Yes, sir; we do—we generally do; yes, sir.

Q. Now, what was it the next day?

A. On the 14th it was 38° 10′ north and 53° 14′ west. The wind headed us off this day. We only lay up about north-northwest on this course for Halifax.

Q. Were those positions as correct as you could make it by the
106 method you had of determining your position? You say they are wrong. How do you know that?

A. They are not right.

Q. Not exact, you mean?

A. Yes, sir.

Q. But they were approximately correct?

A. Yes, sir; they were to me.

On cross-examination the defendant testified in regard to the log book and to what has been spoken of as duplicates, thus:

Q. (By ONE OF THE COURT.) How did you get the information necessary to enter in your log what happened on deck while the second mate had command and you were below?

A. Well, I am sorry to say that we was not particular about making errors.

Q. That is not the question I asked you. I asked you where you got your information which enabled you to enter upon your log book what took place on board your ship when you were below and the second mate had command of the deck?

A. None whatever, sir; there were none.

Q. Is your log book presumed to cover any of the time when the second mate had command of the deck and you were below?

A. No, sir.

Q. (By DISTRICT ATTORNEY.) Mr. Braun, why did you make that duplicate of the log book?

A. I started, as I told you, to make duplicates of all of them.
107 Q. Of all of what?

A. All of the occurrence; but realizing the nominal price of the book, I stopped it.

Journal from Copy of Log Book Boston towards Buenos Ayres

H	K	F	COURSES.	WINDS.		LEEWAY.	THERMOMETER.		BAROMETER.	REMARKS.
				Intervals	Points		Air	Water		Wednesday 1st of July 1896
1										
2			E b S	South						At 4 A.M. hove short and at 6
3										A.M. took tug and towed out
4										at 7.30 A.M. Boston light
5										Ships bore about from which
6	5									I take my Departure
7	5									
8	5									Pumps well attended
9	5									Lights looked after
10	5									
11	5									
12	5									
1										
2										
3										
4										
5										
6										
7										
8										
9										
10										
11										
12										

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Lon.	Lon. by [illegible]	Lon. by Obs.
E by S	35	3	30	42.17		13°	27	70.18	

H	K	F	COURSES.	WINDS.		LEEWAY.	THERMOMETER.		BAROMETER.	REMARKS.
				Intervals	Points		Air	Water		Thursday 2nd of July 1896
1										
2			E b S							
3				S W						This day comes in with light
4										S W wind and head seas
5										
6										at 8.30 P.M. Eryholands
7			S E							light bore W b N Dist 18 miles
8										
9										
10				S W						Pumps well attended
11										
12										
1										
2										
3										
4										
5										
6				S W						
7			S S E							
8										
9										
10										
11										
12										

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Lon.	Lon. by [illegible]	Lon. by Obs.
S 43° E	120	69	76	41.43	41.50	13	97	68.75	68.42

15079

Journal from Copy of Log Book Boston towards Buenos Ayres

H	K	F	COURSES.	WINDS. Direction.	WINDS. Force	LEEWAY.	THERMOMETER. Air	THERMOMETER. Water	BAROMETER.	REMARKS.
										Saturday 10th day of July 1796
1	5									
2	5		SE							Thus day comes in with the
3	5									
4	5									foggy weather with moderate
5	5			SSW						
6	5									winds
7	5		SE							
8	5									At 8 AM took in all
9	6									
10	6									Small Sails at 7 AM
11	6									
12	6		SE							Sat all Sails
1	4			SSW						
2	4									Pumps well attented
3	4									
4	4									Lights looked after
5	4									
6	4									
7	4			SSW						
8	4									
9	6									
10	6									
11	6									
12	6		SE							

Course.	Distance	Diff. of Lat.	Departure.	Lat. by D. R.	Lat. by Ob.	Variation.	Dif. of Lon.	Lon. by D. R.	Lon. by Ob.
SE	130	86	86	40 24		14°	117	63 46	

H	K	F	COURSES.	WINDS. Direction.	WINDS. Force	LEEWAY.	THERMOMETER. Air	THERMOMETER. Water	BAROMETER.	REMARKS.
										Sunday 11th day of July 1796
1	7									
2	7		SE							Thus day comes in with mod
3	7			SW						
4	7									
5	7									winds and smooth seas
6	7									
7	7									
8	7									slitely overcast
9	7		SE							Pumps well attended
10	7			SW						
11	7									Light look out for
12	7									
1	7									
2	7									
3	7									
4	7									
5	7									
6	7			SW						
7	7		SE							
8	7									
9	7									
10	7									
11	7									
12	7									

Course.	Distance	Diff. of Lat.	Departure.	Lat. by D. R.	Lat. by Ob.	Variation.	Dif. of Lon.	Lon. by D. R.	Lon. by Ob.
ESE	179	79	160	39 10		11	180	63 16	

Journal from Copy of Log Book Boston towards Buenos Ayres

H	K	F	COURSES.	WINDS. Direction	WINDS. Force	LEEWAY.	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS. Saturday 13th July 1796
1	9									
2	9									
3	7		SE by E	W	4					This day comes in with
4	9									
5	9									fresh winds at 5 30 P M
6	9									took in Jib topsails and
7	9									
8	9									royal and mizen topsail
9	9									
10	9		SE by E							
11	9			W	4					Pumps well attended
12	9									
1	9									
2	9									
3	9									
4	9									
5	9									
6	9		ESE							
7	9									
8	9									
9	9			W by S	4					
10	9									
11	9									
12	9									

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Ob.	Variation	Diff. of Lon.	Lon. by D. R.	Lon. by Ob.
	216	84	210	36 10	36 56	15	240	56 20	

H	K	F	COURSES.	WINDS. Direction	WINDS. Force	LEEWAY.	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS. Sunday 14th July 1796
1	8									
2	8									
3	8		SE by E	W	4					This day comes in with
4	8									
5	8									Variable winds but fare
6	8									
7	8									at 7 P M too
8	8									took in all fore and aft
9	8		SE by E							
10	8									Sails at 8 30 A M Set all
11	8			W by S	4					
12	8									Sails and wind increased
1	8									
2	8									from W to W
3	8									moderate all through this watch
4	8		S E							
5	8									Pumps well attended
6	8									
7	8									
8	8			W by S	4					
9	8									
10	8									
11	8									
12	8									

at about 2 or 3 P M

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Ob.	Variation	Diff. of Lon.	Lon. by D. R.	Lon. by Ob.
S 72 E	232	73	180	36 57		16	226	53 25	

15081

Copy of Log Book

Journal from Boston towards Buenos Ayres

H	K	F	COURSES	WINDS		LEEWAY	THERMOMETER		BAROMETER	REMARKS
				Variations	Force		Air	Water		Wednesday the 15 day of July 1896
1										
2										
3										
4										
5										
6										
7										
8										
9										
10										
11										
12										
1										
2										
3										
4										
5										
6										
7										
8										
9										
10										
11										
12										

Courses | Distance | Diff. of Lat. | Departure | Lat. by D. R. | Lat. by Obs. | Variation | Diff. of Lon. | Lon. | Lon. by Ob.

39 20

H	K	F	COURSES	WINDS		LEEWAY	THERMOMETER		BAROMETER	REMARKS
				Variations	Force		Air	Water		Tuesday the day of July 1896
1										
2										
3										
4										
5										
6										
7										
8										
9										
10										
11										
12										
1										
2										
3										
4										
5										
6										
7										
8										
9										
10										
11										
12										

Courses | Distance | Diff. of Lat. | Departure | Lat. by D. R. | Lat. by Obs. | Variation | Diff. of Lon. | Lon. | Lon. by Ob.

38 10 | 33 12

On this day at 3 30 PM the steward of said H Fuller came to me and told me that the sailors all came and made an open statement to him in refrence to one of the sailor whos name is Charles Brown conduct of guilt in regards to the murder which took place on board said Vessel Sat once got each mans statement Then upon the strength of these statement we concluded to put him in Irons at day break at 7 PM all hands was mustard aft and throughly search and Stiff no other weapon was given them but their Knives each man was then placed seven distance apart from each other on the after house Myself the Steward & passenger was stationed armed ships well armed and Kept a good lookout untill day break At 5 AM Charles Brown was manded and put in Irons Now actions all night very suspicious and got himself all ready as it were to jump over the side but he was well guarded by all hands on board at 30 AM he made an effort to pull for the forward part of the ship but was instantly stop by the Steward upon a pointed revolver towards him

Moderate weather winds & seas

Thomas M Bram Master
Jonathan Spenser Steward
Peter Countryman Monks
" R Lyons
John Massene
Oscar Anderson
Henry Blair

Tuesday the day comes on with moderate winds and smooth seas and several times taking in and setting sails we then procured the bodys with tar and sowings and put them on the little boat and ships then written statement was taken and signed by members of the crew

At 8 A M then being the nearest port bearing about

S W by S 720 miles

15082

Journal from Boston Mass U.S. towards Buenos Ayres

Copy of Loose Sheets

H	K	F	COURSES	WINDS	LEEWAY	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS
1									Wednesday 7th July 1796
2									
3			Part of Eight Days work at Noon						At 4 A M have short and at
4									6 A M look tug and towed
5									
6	5		E b S	South					out at 7 30 A M Boston
7	5		"	"					light ship bore abeam from
8	5		"	"					which I take my departure
9	5		"	"					
10	5		"	"					
11	5		"	"					
12	5		"	"					
1									
2									
3									
4									
5									
6									
7									
8									
9									
10									
11									
12									

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Lon.	Lon. [illegible]	Lon. by Obs.
E ½ S	35	3	30	42 17		13° 12' W	27	70 18	

H	K	F	COURSES	WINDS	LEEWAY	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS
1	4		E b S	S W					Thursday 8 July 1796
2	4		"	"					
3	4		"	"					This day comes on with light
4	4		"	"					
5	4		"	"					South west wind and head
6	4		"	"					sea at 8 30 P M Lands
7	4		S E						light bore W by N Dis 18 m
8	4		"	"					
9	4		"	"					
10	4		"	"					Pumps well attended
11	4		"	"					
12	4		"	"					
1	4		"	"					
2	4		"	"					
3	4		"	"					
4	4		S S E						
5	4								
6	4								
7	4								
8	4								
9	4								
10	4								
11	4								
12	4								

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Lon.	Lon. [illegible]	Lon. by Obs.
S 45° E	98	69	69	41° 43'	41° 32'	13°	93	68 40	68 40

15083

Copy of Loose Sheets

Journal from Boston Bar to S. Edwards Buenos Ayres

H	K	F	COURSES	WINDS		LEEWAY	THERMOMETER		BAROMETER	REMARKS Thursday the 4th July 1816
				Direction	Force		Air	Water		
1	4									
2	4		SE	SW						
3	4									
4	4									This day comes on with dense
5	4									foggy weather with moderate
6	4									
7	4									breeze Pumps well attended
8	4			SW						
9	4									
10	4									and good lookout
11	4		SE							
12	5						1/2 62			at 8 30 PM took in
1	5									
2	6		1 2 3 3 4 8							Royal Jib topsail
3	5		1 2 3 8 3 8							
4	6			46						& Main topmast Stay
5	5									
6	5									Sail at 7 A M
7	5		SE							
8	5			SW						Sat all sails
9	6									
10	6									
11	6									
12	6									

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Ob.	Variation	Diff. of Lon.	Lon. [illegible]	Lon. by Ob.
S 45° E	130	86	86	40° 24'	40° 24'	13	1.17	66 46	none

H	K	F	COURSES	WINDS		LEEWAY	THERMOMETER		BAROMETER	REMARKS Friday the 5th July 1816
				Direction	Force		Air	Water		
1	7					1/2 P				
2	7		SE							
3	7			SW						
4	7									
5	7									This day comes on with
6	7									
7	7		SE							moderate wind and mad
8	7									
9	7									head sea weather slightly
10	7			SW						
11	7									
12	7									overcast
1	7		84							
2	7		168							
3	7									
4	7									
5	7									
6	7		SE							
7	6			SW						
8	6									
9	6									
10	6									
11	6									
12	6									

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Ob.	Variation	Diff. of Lon.	Lon. [illegible]	Lon. by Ob.
E SE 1/2 E	161	74	145	39 10	39 10	14°	180	63 46	none

15084

H	K	F	COURSES	WINDS	LEEWAY	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS
1	9								Saturday July 11 1896
2	9								
3	9		S S E		2 S E				Thus day comes in with
4	9								
5	9			W S W					mod breeze and mod seas
6	8								at 5-30 P M took in Jib
7	8								
5	9		E S E						top sail and and mizn
9	9								
10	8								topmast staysail moderate
11	9								
12	10								winds and rain squalls
1	10								
2	10			W					
3	8		E S E						
4	9								
5	8								
6	9								
7	8								
8	8								
9	7		E S E	W S W					
10	7								
11	9								
12	10								

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Long.	Long.	Long. by Obs.
E by S	199	76	210	38 10	38 00	15	240	60 11	Same

H	K	F	COURSES	WINDS	LEEWAY	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS
1	8		S E by S	W S W					Sunday July 12th 1896
2	8								
3	8		"	"					Thus day comes in with light
4	8								
5	8		"	"					variable wind and much
6	8								
7	8		"						brook in all fore and aft
8	8		"	"					Sails at 8 30 A M sat
9	8								
10	8		"	"					Spanker and mainsail
11	8		"	"					
12	8								
1	8		"	"					Pumps well attended
2	8		"						
3	8		"						
4	8			"					
5	8								
6	8		"	"					
7	8		"	"					
8	8			"					
9	8			"					
10	8		"						
11	8			"					
12	8								

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Long.	Long.	Long. by Obs.
S 72° E	232	73	180	36 57	36 57	16	226	56 29	

15085

H	K	F	COURSES	WINDS Direction	WINDS Force	LEEWAY	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS
1	9		E b S E							Monday 13th day of July 1696
2	8			W b S	W					
3	9									This day comes in with m
4	9									
5	9									breze and smooth seas
6	9		E b S E							
7	8									at or about 2 A M Incres
8	8									
9	8									there an Alarm Made by fir
10	8									Mr Munkes That there was
11	8			W b S	W					mutenery on board which was
12	8									deck at the time seen we were
1	9		E b S E							of what had been done but as
2	8									It was my watch on deck at
3	8									and Mr Munk was at dinner in
4	8									cabin and found that the Capt
5	8									and his 2nd Mate had
6	8									been Killed with an axe which
7	8			W b S	W					weapon was thrown overboard by one
8	8									of Mr Munks wyd steerage
9			E b S E							till hands was brought aft but
10										none could account for it
11										we then concluded to put the Ship
12										back to the Nearest Port to make
										known the same

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Long.	Long. made	Long. by Obs.
S 72 E	212	72	162	67	=	16	201	53 0 W	

H	K	F	COURSES	WINDS Direction	WINDS Force	LEEWAY	THERMOMETER Air	THERMOMETER Water	BAROMETER	REMARKS
1	5									Tuesday 14th day of July 1696
2	5			West						
3	5									This day comes in with fresh
4	5									and heavy seas and rain squally
5	5									severall times took in and set Sails
6	5		A							as we then tried to preserve the
7	5									Ships by laying Courses and Double
8	5									Reefs in the Night and at 4 Clock
9	5									wore ship the Boat and all Hands
10	6									were Imployed by all hands
11	6									
12	6									Halifax being the nearest
1	6									Port we Intended for to
2	5									
3	5									Bearing about N N W
4	5									
5	5									720 miles
6	5									
7	5									
8	5									
9	5									
10	5									
11	5									
12	5									

Course	Distance	Diff. of Lat.	Departure	Lat. by D. R.	Lat. by Obs.	Variation	Diff. of Long.	Long. made	Long. by Obs.
	124			38 10				53 14	

Q. But why did you make—begin to make the duplicates?
A. For the vessel may go away with the log book.
Q. And what did you want the duplicates for?
A. Well, to bring with me ashore.
Q. In case the vessel went off?
A. Yes, sir.
Q. You wanted duplicates to show what took place on board the vessel?
A. Yes, sir; I was going to; yes, sir?
Q. You thought the vessel was going off when she got in?
A. I didn't know whether they would keep her or not; I couldn't tell. I knew none of us would go back on her.
Q. But it was for the purpose, in case she did go off with that log book, of having your duplicate on shore to show?
A. That was my intention, sir, for starting it.

The witness, also on cross-examination, upon being specifically asked, stated to the court and jury many differences between the log book and the so-called duplicates.

A copy of the log book from July 8 to July 15 is as follows:

The copy shows the several instances where a correction has been made on the originals of all the copies by writing a word or a figure over another.

[**Folios 108 to 111 to face page 51.**]

112 Copies of the "loose sheets" or so-called duplicates, covering the same period from July 8 to July 15, are as follows:

The copies show the several instances where a correction has been made on the originals of all the copies by writing a word or a figure over another.

[**Folios 113 to 116 to face page 51.**]

117 In cross-examination, but subsequent to the foregoing testimony in regard to the log book and the loose sheets or so-called duplicates, and after the log book and the loose sheets had been put in evidence, Mr. Bram was asked:

Q. What was the course you were sailing?
A. For Cayenne.
Q. No; what was your course that you were sailing from the day before, through the night, and up to the time that you started for French Cayenne?
A. Well, just give me the log book and I will refer to it.
Q. No; can't you recollect that?

DEFENDANT'S COUNSEL. I think he is entitled to the log book, your honors.

The district attorney then produced the log book and had certain loose sheets of paper in his hand, being the so-called duplicates.

The DEFENDANT. Let me take those (referring to the sheets the attorney held).

DISTRICT ATTORNEY. Well, you take the log book and determine from that.

WITNESS. Well, I think I am entitled to the whole thing that has any connection with this time.

WEBB, J. Your counsel will see that you have your rights. If you want anything, you may have it if it is proper. If you ask for those sheets, you are not entitled to them in reply to that question.

118 DEFENDANT'S ATTORNEY. If they will enable the witness to refresh his recollection, if your honor please, a memorandum made by him in reference to this same matter.

WEBB, J. Mr. Cotter, this witness has testified that he, day by day or habitually, entered in his log book proper memoranda, or notations, he called them, of the progress of the ship on the voyage.

Mr. COTTER. Yes, your honor.

WEBB, J. But after he got about on the other course, several days after, he took it into his head that the ship when she sailed from whatever port she might make might carry away that log book, and undertook to make what he called a duplicate.

Mr. COTTER. Yes, your honor.

WEBB, J. And the evidence this morning shows it is not by any means a copy. He was making something to be used as evidence, a pure manufacture at that time.

Mr. COTTER. It appears, however, that that was made from something else than this log book.

WEBB, J. Well, now he is asking him about this log book, to give the ship's position.

Mr. COTTER. That he copied from this log book, and we submit that he is entitled to that, your honor.

The stenographer read the question, i. e.:

"Q. What was the course you were sailing?"

"WITNESS. For Cayenne."

119 "Q. No; what was the course you were sailing from the day before, the night, and up to the time that you started for French Cayenne?"

The case then proceeded.

DISTRICT ATTORNEY. Now, I would like to have him answer.

ONE OF THE COURT. Do you object, Mr. Cotter? I saw you rise.

Mr. COTTER. I would like to have the reporter read the last two or three questions.

The stenographer read the question again, and, at Mr. Cotter's request, read what took place between himself and Judge Webb, up to and including the words by the judge: "And the evidence this morning shows it is not by any means a copy. He was making something to be used as evidence, a pure manufacture at that time."

Mr. COTTER. That statement, your honor, we object to. We take exception to your honor's statement that it was a pure manufacture.

WEBB, J. I didn't say anything about a "pure manufacture."

The STENOGRAPHER. I so understood it, your honor.

WEBB, J. Well, strike it out; strike out all that I have said. Every remark I made may be stricken out.

No exception save as above set forth was taken at this time, and none was saved or allowed by the court. The facts and all the testimony relating thereto are inserted in this bill of exceptions in order that the defendant may have such advantage of them as he may be legally entitled to.

120 The defendant, Bram, upon cross-examination, further testified that when he engaged to go on the ship he told Captain Nash that he came from Nova Scotia, yet he had not lived in Nova Scotia but

one month, and that at a time three or four years prior to so stating to Captain Nash. He also said in that connection: "But I have been through the province, you know, pretty often; been in command of Nova Scotia vessels, and that is why I hail from there."

On redirect examination he said that he showed to Captain Nash various letters of recommendation from his former employers, and he offered to introduce those letters in evidence, with a view of showing that he had dealt frankly in conveying the information that he had to the captain, and to meet the suggestion of the Government that the defendant misled the captain in stating the fact that he hailed from Nova Scotia.

On the Government's objection, the letters were excluded, and the defendant excepted, and his exception was allowed.

LESTER H. MONKS, a Government witness, who was passenger on the Herbert Fuller, had testified in chief that on the night the murders were committed he had gone to bed at about 8 o'clock, and was aroused by a scream and the sound of heavy breathing at about 2 o'clock in the morning; that he got up and went out of his room into the after cabin where the captain slept, and found the captain lying on the floor and his
121 cot overturned; that he put his hand on him, but got no speech; that he then passed into the room occupied by Mrs. Nash, to call her, and there saw what convinced him that something was wrong; that he at once went on deck and called Mr. Bram, the mate, to come below, for the captain was killed; that Bram went into the cabin with him, and remained a short time, and both returned to the deck; that soon after their return to the deck Bram began to say he was sick; that he got a drink of whiskey at 12 o'clock from the second mate; he said the second mate gave it to him in a tin cup and then threw the tin cup overboard; and that he said he thought he was drugged; that Bram then put his finger down his throat and began to vomit on the deck; that, after the steward had been called at daylight, Bram repeated to the steward what he had said to the witness about the drink obtained from the second mate; "he said that he got a drink from the second mate, who said he got it from me, and that it was drugged," and Spencer, the steward, said, "Is that so? We will put some of the vomit in a bottle and bring it ashore and have it analyzed;" and when that was said, Bram sat down on it.

Q. What happened?

A. He wiped it off the deck with his trousers.

Q. Where was he sitting when he did that?

A. Oh, he was sitting on the rail—on the starboard rail.

Q. Can you describe to the jury any more particularly how he acted just then, how Mr. Bram acted just at that moment?

122 A. He was sort of sitting up against the rail, and he sat right down and slid along, wiped it up.

JONATHAN SPENCER, the steward, called and testified in chief, testified:

Q. Did you have any conversation with Bram about the vomit?

A. Yes, sir.

Q. Tell what the conversation was; who was present, and when?
A. This was in the morning, sir, before anyone was called.
Q. And who were they?
A. Myself, the passenger, and the mate.
Q. Where was the mate?
A. The mate was up on the rail, on the starboard side.
Q. Tell us what took place?
A. The mate says the second mate gave him some whiskey last night. He says first out of a bottle; and then he spoke of the whiskey again, and he says he gave it to him out of a cup, and I says, "Out of a cup?" and he says "Yes," and I turned my eyes from him as soon as he said it was from out a cup; and he said the second mate said he got it from the passenger, and he said "I don't know if it was drugged or not, but there it is," and I went up and looked at it, and it smelt strong of liquor; and he says, "Shall we take it ashore and have it analyzed?" and I says "Yes." Then the mate, who sat on the starboard side, he fell right down in the spew; and I says, "Jesus Christ, you haven't got any-
123 thing there to take up now," and he rubbed it in the seat of his pants and made me a foolish answer. The mate said that that should be taken ashore to be analyzed, and I said, "Yes, sir."
Q. How much of it was wiped up?
A. It was all wiped up; but very little leave there.

That said sailor, LOHEAC, also testified that after the discovery of the murders, upon being relieved from the wheel, "I went on the deck load, and right between the main and mizzen mast I saw some vomit on the deck. I heard Jonathan Spencer mentioning to take some on shore. The mate Bram, who was sitting on the mast of our small boat, let his feet slip from underneath him and wiped the whole of it with his pants."

BRAM himself, on this matter, testified on the defence that after he and the passenger had come from the cabin to the deck they were stationed somewhere about the mizzen rigging on the weather side (starboard side). "And while we stayed there, I thinking of the sight that I seen down in the cabin, I got sick to my stomach, throwed up a little close to where I stood."

Recurring to this subject later in his testimony in chief, he testified:
Q. It has been stated by somebody that after the murder, and when you were on deck, that you were sick to your stomach and heaved up, and there was some talk about what you heaved up and analyzing it. Do you have in mind what I have reference to?
A. Yes, sir.
124 Q. Well, now, what have you to say about that?
A. Well, to the best of my recollection about that, there was very little of this stuff, and whatever was said about this it was said after I had slid into it.

On cross-examination he testified:
X Q. Now, let me have you tell us once more what you said about the vomit to Monks and Spencer.
A. In regard to writing that document?

X Q. No; with regard to the vomit, when you were there on deck and the vomit was there. Please tell us just what you said and they said about that vomit.

A. I remember when Monks and I came up on deck, after I had seen the condition the captain was in, I got sick to my stomach from seeing the sight down below and throwed up a little on the weather side—the starboard side. The next morning—there was nothing said about it then—the next morning I went along—probably I better take the model here.

DISTRICT ATTORNEY. I guess you can tell where you were.

A. Mr. Monks and I stationed about just abaft the mizzen rigging. As mentioned previously, we had a temporary rail built of this 3 x 4 stuff that came up about two feet six inches about the deck load. We both staid around here [indicating]. One time we sat down, and another we kept walking. This little bit that was throwed up was somewheres around here, just abaft the mizzen rigging. There was nothing said about that till the next morning. Who brought the conversation
125 up I do not just remember, but Mr. Monks says, "You probably might have been drugged." Said I, "I don't think the second mate had any drug in that bottle." "What do you know about it?" He says, "Well, you don't know what was in that drug—that liquor you gave me." And I says, "That didn't make me sick, I don't believe, because there is very little of it thrown up." We came along here [indicated] and I leaned against this rail. To the best of my recollection, my feet slipped some way or other from under me, and I remember the slippers I had on got into this little bit of stuff, this bread sandwich. We stood on the deck there then; and there was nothing more said about it to my knowledge, about analyzation or nothing else.

X Q. Nobody said that?

A. Not to my knowledge, sir; I don't remember.

By ONE OF THE COURT. You said it was wiped up by your slippers?

A. The slippers, yes, sir; that slid into it. I was standing close up, leaning on the rail.

After the evidence for the defendant was closed the Government called as a witness in rebuttal Lohcae, one of the crew. He was asked:

Q. Whether or not you noticed on the morning after the murder any vomit on the deck load?

A. Yes, sir.

Q. Describe how much and what the size of it was.

126 The defendant objected to the question on the ground that the matter had already been inquired into of the witness on the Government's case in chief, and, further, that the question of the amount of vomit was a collateral matter, brought out on the cross-examination of defendant. The exception was overruled and exception taken and allowed.

A. It was about as large as the top of a spittoon.

LESTER H. MONKS, being recalled, testified (the same objection being made and overruled and exception taken and allowed):

A. I think there was a good deal.

(Objection was made to the witness using the expression "I think." This objection was sustained.)

Q. Can you describe it?

A. It covered quite a space on the deck.

Q. Please define "quite a space."

A. I should say a space as big as that on the deck [showing with his hands on the witness stand].

Upon his direct examination the defendant testified that Cayenne, in French Guiana, was, under the conditions existing of the wind after the murder, the nearest port towards the port of the destination of the vessel, which was Rosario, up the river Platte above Buenos Ayres, and he further testified on cross-examination that the ordinary trip from Boston to Buenos Ayres took fifty or sixty, sixty-five, probably seventy days.

127 In rebuttal the Government called EDWARD G. PARKER, a sea captain of forty-two years' experience at sea, thirty-five of which as captain, who testified that under favorable conditions it would take from fifty to sixty days from Boston to Buenos Ayres. He was asked how long it would take to go from Cayenne to Buenos Ayres.

It appearing from answers to questions put to him by defendant that the witness had sailed from Boston to Buenos Ayres, from Boston to Cayenne, and from New York to Cayenne, but that he had never sailed from Cayenne to Buenos Ayres, or to Cape St. Roque, nor to any other South American port, the defendant objected to the question.

The objection was overruled and the witness answered:

"Not less than 75 or 80 days."

Exception to the admission of the evidence, which exception was allowed.

In making its case in chief the Government had called one Lester H. Monks, who testified in substance that Bram, on being called and notified that the captain had been killed, went into the cabin with the witness and went into the room of the witness and waited for him to put on some clothes; that at that time both passed through the captain's room to the passenger's room, but that neither went to the captain, nor to the second mate's room, nor to Mrs. Nash's room.

128 In the defence, Bram, the defendant, testified on his direct examination, in substance, that when he went into the cabin with Monks, a lantern hanging in the main cabin, and with the flame turned low, was taken down and the flame turned up quite bright; that passing through the after cabin, where the captain was, he saw the captain lying there dead, or nearly dead. Once in a while there would be a gurgling sound—this sound he imitated—giving the sound of heavy stertorous breathing, and quite a time afterwards another such sound; that he, seeing this, went over to the captain's feet (which were towards the passenger's room) and felt of his feet, and they were cold; that with that he ran back into Monks's room, and stationed himself by the door, and kept peeping on the outside, looking all around, because the cabin was then in perfect darkness, in the further or main cabin, while Monks was putting his clothes on; that when Monks had put his clothes on, he, Bram, said, "Let us go into Mrs. Nash's room now and see Mrs. Nash's room," and that

Monks replied, "It ain't no use to go in there; I have been there; she is dead already; don't lose any time in this cabin; there is too many holes around," and that both then returned to the deck.

Upon his direct examination Bram testified:

"Monks said to me, 'Where is the second mate?' Says I, 'It is his watch below. Ain't he in his room?' He said, 'I didn't see him.' 'Well,' said I, 'if he is not down there he is forward with the
129 men.' We came back and stood here. Said I, 'Monks, let us go forward and wake the steward up.' He says, 'Don't neither you nor I leave this station where you are, because we don't know who is under these boats here forward.' 'Well,' said I, 'I think it is better to get some one with us than to be alone.' Said he, 'We will wait till daylight and call the steward. Don't move here, because it ain't safe.' Said I, 'All right; we won't move, then.'"

He also testified that while they were sitting there on the deck he started to go look for the second mate, but that Monks called him back; and he denied that he told Monks that he (defendant) had not been down in the cabin since 12 o'clock at night.

LESTER H. MONKS, being recalled in rebuttal by the Government, testified in answer to questions as follows:

Q. When you and the mate, Bram, went down into the cabin—when you first called him, and he went down with you into the cabin—what, if anything, did he do in regard to the captain's feet?

Mr. COTTER (defendant's attorney). Wait a moment. That they went into in chief, if your honors please, clearly.

DISTRICT ATTORNEY. No; beg your pardon.

Mr. COTTER. The witness was examined in relation to it.

COLT, J. The question is admissible, limited as it is.

Mr. COTTER. We will ask your honor to save our exception.

(Exception allowed.)

A. He did not go anywhere near the captain at all.

130 Q. Did he touch the captain's feet?

A. No, sir.

Q. When you were down there at that time, what, if anything, did he do in regard to looking out of your door, and through the chart-room door into the forward cabin?

A. He didn't look out there at all. He was inside in my room the whole time.

Q. How far inside your room?

A. Right inside the threshold, sir, two or three feet.

Q. Did he stand at your door and peek out into the forward cabin through the chart-room door?

Mr. COTTER. Wait a moment. We object on the other ground, in addition to the ground stated, that this is a matter brought out in cross-examination, if your honors please.

COLT, J. Admitted.

Mr. COTTER. I except.

(Exception allowed.)

A. No, sir; he did not.

Q. While you were down in the cabin together, either in your roo
or on the way from your room to the forward companion-way, did t
mate, Bram, say anything to you, and if so, what, about going into M
Nash's room?

Mr. COTTER. The same objection, your honor.

(Admitted, exception taken, and allowed.)

A. He said nothing at all, sir, about it; didn't mention it.

131 Q. Did you say anything to him, and if so, what, in regard
its being of no use to go in there?

A. No, sir.

Q. Did you have any conversation with Mr. Bram while you and h
were on deck, immediately after your discovering the murders, in regar
to his having gone below between twelve and two o'clock?

Mr. COTTER. We make the same objection.

(Admitted and exception taken and allowed.)

A. He told me he had not been below since twelve o'clock, when h
had the drink with the second mate.

On his cross-examination Bram had testified for the first time tha
during the night of the murders, and after they had been committed, h
was going down to see if the second mate was in his room; that wa
after Monks had asked where the second mate was.

Monks, when recalled in rebuttal, was asked, "Whether or not th
first mate (Bram) got up and walked in the direction of the second mate'
room, and whether or not you called him back?"

(Objected to; admitted. Exception allowed.)

A. He did not get up at all, and I did not call him back, because he
did not get up.

The Government in rebuttal called Thomas Cutler, who testified that
he had at one time been chief mate of the "Herbert Fuller." He
132 was then asked as to what was the proper position of the mate at
night on board the vessel. This was objected to, and the court
said:

COLT, J. At the stage which this case has reached we don't think the
question admissible. Excluded.

He was then asked by the Government:

Q. Have you ever steered the "Herbert Fuller?"

A. Yes, sir.

Q. How did she act?

Mr. COTTER. One moment.

Mr. FRENCH. That has all been gone into in the testimony in chief
by the Government.

Mr. HOAR. I won't in-si-st upon it.

COLT, J. Question withdrawn.

The district attorney, in his closing argument to the jury, said: "He
(referring to the defendant) says that Charlie Brown could leave that
wheel. I say he could not. They have produced a lot of sea captains
to say that he could leave wheel. I put on Mr. Cutler, who was a mate
on that vessel, and if you can argue from the nonproduction of wit-
nesses, can you not argue from the failure to put questions?"

Mr. COTTER. We except to that evidence—evidence excluded by the court and called out of order. We submit it is not proper, and we except to that branch of his argument.

WEBB, J. The facts are before the jury, the fact of the calling of the witnesses.

Mr. HOAR. I withdraw that. That may be stricken out.

133 At the conclusion of the evidence, and after the counsel on both sides had fully presented their views to the jury in arguments, without restriction of time, the court instructed the jury, and among other things instructed them thus:

"You are now approaching that part of this proceeding where the sole responsibility rests upon yourselves. You have heard the evidence, under such directions as the court has given with regard to its admissibility; you have seen the witnesses; you have heard the arguments of counsel upon both sides. But you are to remember that testimony, to analyze it, to weigh it, to compare its different parts together to determine for yourselves what the evidence establishes to your minds, and act upon it. You are not to be governed by the arguments of counsel beyond that degree to which they commend themselves to your own understanding and your own intelligence. You are not to be affected by any admissions or statements made by counsel in opening or closing, but you are to be governed by the evidence and the law. You are not to be affected by any supposed indication of an opinion of the court, or if an opinion had been directly expressed to you by the court you would have no authority to accept it in substitution for your own independent, original, careful determination on the matters yourselves. But in so far as you find the arguments of counsel supported by the evidence and by sound reasoning, compatible with the common knowledge of man-
134 kind, in so far you will respect them. But you are the final arbiters of the evidence and of the fact under the law as the court shall give it to you."

At the conclusion of the charge, and before the jury had retired, the counsel on either side, upon inquiry, having stated that they took no exception to the charge and had no further requests for instruction to make, one of the defendant's counsel said, "We desire to make a general exception, to save our rights simply," and then passed to the court a written paper as follows:

"And now comes the defendant, after the charge and before the jury have retired, and claims an exception to all objectionable and prejudicial matter, whether it was elicited by the Government or the court, and to all statements of fact and opinion, and examination of witnesses by one member of the court during the trial, which said matter, statements of facts and opinion, and examination of witnesses more specifically appear in the official stenographic report of said trial, to which reference is hereby made at pages 1080, 1348, 1372, 1385, 1482, 1483, 1484, 1490, 1572, 1593, 2000, and aliunde, and whether such statements, opinions, and examinations were withdrawn or not, on the ground that no right of exception is or can be waived in a capital case."

The matters above referred to upon which the defendant relies in support of the above exception are as follows:

In the testimony of Francis M. Loheac (page 1080 of said stenographic report):

135 "Q. (By WEBB, J.) When the vessel was allowed to fall off or come up in the wind from any cause, would a person upon the deck know the facts?

"A. Yes, sir."

In the cross-examination of the defendant, Bram (pages 1347 and 1348 of said stenographic report), he was asked by the district attorney:

"Q. Didn't you tell Lester Monks that you were a French Canadian?

"A. No, sir.

"Q. Never on board that ship?

"A. No, sir.

"Q. If he says that, is he telling what is not true?

"Mr. COTTER. Wait a moment. We object.

"WEBB, J. What is your objection?

"Mr. COTTER. He said, 'Is that untrue?'

"Mr. HOAR. No, no, no, that is not what I said.

"Mr. COTTER. I so understood your question. 'If he says that, does he say that which is untrue?' I don't think the witness is called upon to express an opinion.

"WEBB, J. It is not expression of opinion if he denies a fact within his own knowledge.

"Mr. COTTER. It may be—I don't think he is called upon to characterize that, if your honor please, whether that is untrue or not.

"WEBB, J. The question is only meant to emphasize the other
136 answer. He says he never did tell Mr. Monks so. If he never did, and Monks says he did, everyone will understand the consequence."

Also at page 1572 of said stenographic report, the remarks of Mr. Justice Webb during the colloquy in regard to the sheets with similar entries to those in the log book, printed on pages of these exceptions.

"Said Sailor Brown testified in relation to his appearance before the grand jury as a witness as follows:

"Q. (By Mr. HOAR.) Did you testify before the commissioner here in Boston? Did you tell your story here in Boston in court before?

"A. No, never.

"Q. Did you tell a story before the grand jury in Boston?

"A. Yes, sir.

"Q. When before to-day were you in this court in this case?

"A. I beg pardon?

"Q. When before to-day were you in this court room the last time?

"A. The 22nd of November.

"Q. The 22nd of November?

"A. I beg pardon; the 22nd of October.

"Q. Of October?

"A. On the grand jury.

"Q. On the grand jury?

"A. Yes, sir.

137 "Q. What happened to you then?
"A. I was set free.
"Q. You were set free?
"A. Yes, sir."

* * * * * * *

From the cross-examination:

"Q. (By Mr. COTTER.) The first time you made a statement under oath in this country, then, was when you went before the grand jury?
"A. Yes, sir.
"Q. On the 22nd of October?
"A. Yes, sir.
"Q. How long were you before the grand jury?
"A. In the course of two hours.
"Q. Who conducted your examination?
"A. The district attorney, Mr. HOAR.
"Mr. HOAR. That is entirely illegal, your honor, for him to go into questions before the grand jury, but I make no objection to it.
"Mr. COTTER. I am not going into the testimony at all. You have gone into that already, that he appeared before the grand jury.
"Q. You did not see, or did you, Mr. Bram present?
"A. No, sir.
"Q. And you knew that nobody was there representing Mr. Bram?
"Mr. HOAR. I pray your honor's judgment.
"WEBB, J. He could not know that except by hearsay.
138 "The WITNESS. I don't know nothing.

* * * * * * *

"Q. Did you know that you would be permitted to go free or remain in jail only as a witness in case you testified before the grand jury against Bram?
"A. I beg pardon; I don't understand.
"Q. Did you understand that you would be permitted to go free or be held only as a witness if you went in before the grand jury and testified against Bram?
"A. Yes, sir.
"Q. Yes. Who told you that?
"A. The judge.
"Q. The judge?
"A. Yes, sir; that he would set me free.
"Mr. HOAR. He don't understand you. I don't think he understands the question.
"Mr. COTTER. The fault is not with my question.
"COLT, J. Divide your question, Mr. Cotter, and it will be plainer.
"(Question read by stenographer.)
"Q. Did you understand that by going before the grand jury and testifying that Bram killed those people on board of the——
"WEBB, J. If you will leave out some of those circumlocutions, Mr. Cotter——
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"A. I beg pardon?

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"A. No, sir.
"Q. And you knew that nobody was there representing Mr. Bram?
"Mr. HOAR. I pray your honor's judgment.
"WEBB, J. He could not know that except by hearsay.
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"Q. Did you understand that you would be permitted to go free or be held only as a witness if you went in before the grand jury and testified against Bram?
"A. Yes, sir.
"Q. Yes. Who told you that?
"A. The judge.
"Q. The judge?
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"Q. Did you understand that by going before the grand jury and testifying that Bram killed those people on board of the——
"WEBB, J. If you will leave out some of those circumlocutions, Mr. Cotter——
"The WITNESS. I don't understand you.
139 "Q. Did you understand by going before the grand jury and testifying against Bram you would be permitted to go free?

"A. I understood so much, that if——

"Q. What?

"A. I would understand so much, if I came in before the grand and the grand jury saw me and they did not find any bill against would be set free.

"Q. Who told you that? Did anyone tell you by coming before grand jury they would find no bill?

"A. I didn't know anything about that when I came in.

"Q. Who sent for you to come?

"A. To come into this court, sir?

"Q. Who sent for you to come before the grand jury?

"A. I don't know. Mr. Waters came down for me.

"Mr. HOAR. He says Mr. Waters.

"Q. Before Mr. Waters, the deputy marshal, came for you, didn't know you were going to be called before the grand jury to testify aga Bram?

"A. No, sir.

"COLT, J. I think if that model was removed it would be better.

"Q. Was there nothing said to you about coming before the gr jury?

"A. No, sir.

"Q. At the time you appeared before the grand jury and testified, you understand that you were held on the charge of murder?

140 "A. Yes, sir."

* * * * * * *

From the redirect examination:

"Q. (By Mr. HOAR.) When you came before the grand jury h anybody made you any promise of what would happen if you testifi there?

"A. Nobody spoke"——

The senior counsel for the defendant during his closing argument us the following language:

"The grand jury assembled in October, and you are solemnly informe by the learned district attorney that the grand jury found no bill again Brown. There is something he did not tell you, but which appears the evidence now, Mr. Foreman and gentlemen, that Brown, a defenda charged with murder, under some mysterious arrangement is brough before the grand jury——

"Mr. HOAR. I beg your honor's pardon. There is no evidence what the arrangement was; none at all, on God's footstool.

"Mr. COTTER. I beg your pardon.

"WEBB, J. Let us hear what the arrangement was.

"Mr. HOAR. Mr. Cotter says that under some mysterious arrange ment Mr. Brown is brought before the grand jury. Now there is abso lutely no evidence on that subject on this case whatsoever. I do no think it is proper——

141 "Mr. COTTER. I want to be heard on that, if your hono please. Brown is charged with murder. Brown testified him self that he was brought before the grand jury and permitted to testify Bram has testified that he was not brought before the grand jury and

was not permitted to testify. I say that there is a discrimination between these two men, and I have a right to argue from that discrimination that there is a mysterious arrangement.

"Mr. HOAR. If your honors please——

"Mr. COTTER. An extraordinary——

"WEBB, J. It is farfetched, but we do not propose to interfere."

The court, after deliberation, said to counsel:

"We are now prepared to dispose of the exception which was offered at the close of the instructions given to the jury yesterday afternoon. At the conclusion of the charge to the jury the counsel were asked whether they excepted to the instructions—to anything included in or omitted from them. The reply was that the charge was entirely satisfactory. The counsel for the defendant then presented a paper claiming an exception of the most indefinite character to all objectionable and prejudicial matter. Under the rules and practice of the United States courts exceptions must be taken to any evidence or other matter as it arises or is offered and must then be reserved, and if that is not done exceptions are not allowed. The exception claimed, as above
142 stated, not complying with the rule and practice of this court, is not allowed."

Though the general exception thus referred to is not allowed, it is inserted here at the request of defendant's counsel, that if it should have been allowed the defendant may have the full benefit of their claim, and shall not be deprived of any right by the refusal of the court to allow the exception claimed.

After the jury had been deliberating upon their verdict between 19 and 20 hours they were brought into court and reported that they had not agreed; thereupon they were instructed by the court as follows:

"In respect to your duties I desire to read to you from one of the leading cases on the subject.

"'The only mode provided by our Constitution and Laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps strictly speaking in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, and that you
143 are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other. And with this view it is your duty to decide the case if you can conscientiously do so. But in conferring together you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments. And on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a

doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath.

"'And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows.'

"I think, gentlemen, what I have said sufficiently answers the communication which you made to the court. You will therefore retire for further consideration of this case."

144 To the foregoing instructions the defendant at once excepted and the exception was allowed.

The jury returned a verdict of guilty.

After verdict, and before judgment, the defendant filed a motion for a new trial, supported by affidavits as follows:

(Copy of first motion and affidavits to be inserted here.)

[Caption omitted.]

Defendant's motion for a new trial.

And now comes Thomas M. Bram, the defendant in the above-entitled cause, and moves that the verdict therein be set aside and a new trial ordered, for the following reasons, namely:

First Because the verdict is against the evidence and the weight thereof.

Second. Because the interruptions, statements of fact and opinions, and examinations of witnesses, by one member of the court during the trial were partial, argumentative, and unduly prejudicial to the defendant, insomuch that the defendant has been deprived of a fair trial; and because incompetent and prejudicial matter, introduced by one member of the court by questions and statements and characterizations of the defendant and his testimony and of the closing argument in his behalf, forced the defendant's counsel to protest in the presence of the jury, and thereby to place themselves in the attitude of antagonizing the opinion of the court in respect to the question of guilt or innocence of the defendant; and because the withdrawal of such matter, statements, opinions, and characterizations (where they were withdrawn) could not, and did not

145 remove the unwarrantable influence and prejudice thereby injected into the minds of the jurors.

Third. Because the closing argument of the United States attorney was improper in tone, language, and manner, and because its tendency was, and its effect must have been, to unduly excite the passions of the jury and to arouse in them a feeling of hatred and contempt for and prejudice against the defendant, as well by reason of its said tone, language, and manner as by unjustifiable inferences and deductions from the testimony, and by innuendoes from assumptions of fact not in evidence, and further because he argued upon evidence excluded by the court.

Fourth. Because it appears that the jury misapprehended and misapplied the instructions of the court given them on the morning of Saturday, January second, 1897, when the jury came into court for further instructions, insomuch that they believed, or certain of them believed, that they were then instructed that they must of necessity agree; that the minority must of necessity conform to the opinion of the majority, and that it would not be lawful for them to disagree unless they unanimously concurred in disagreeing.

Fifth. Because it appears that certain of the jurors had prejudged the defendant.

Sixth. Because of the misconduct of certain of the jurors during the trial.

Seventh. Because of the misconduct of certain of the jurors after the case had been given to the jury.

146 Eighth. Because a certain person or persons in the service of the United States were permitted to and did improperly communicate and intermeddle with certain of the jurors during the progress of the trial.

THOMAS M. BRAM,
By his Attorneys,
JAMES M. COTTER,
ASA P. FRENCH.

[Caption omitted.]

Affidavit of Harry J. Booth, filed in support of defendant's motion for a new trial.

I, Harry J. Booth, of Hyde Park, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say:

That I was one of the panel of petit jurors before whom the above-entitled cause was tried; that on or about the 18th day of December, 1896, after the jury had heard the evidence of numerous witnesses called by the United States in support of the charge set forth in said indictment, and while said jury was in charge of the United States marshal, or his deputies or assistants, after an adjournment or during an intermission of the court, while the jury was passing from the court room to the jury room through the hall way or corridor, on the same floor as the court room, a young man, whose name I understand to be Harrington, an assistant of the United States marshal for this district, who had at different times assisted the two bailiffs who had charge of the jury, approached me and said to me privately, "Look in your hat." My hat at

147 this time was in the jury room and on a hook, the number of which correspond' with the number of my seat on the panel, to wit, No. 3. Upon reaching the jury room and looking in my hat I found, tucked within its band, a slip of paper containing certain writing, of which the following is a copy, and the original of which I append hereto, marked "Exhibit, Affidavit of H. J. B.":

"Would you like a ½ pint? If so, give me the tip Sat. morning. I will put it in your pocket. Red."

I did not understand and had no means of ascertaining why the aforesaid official had thus approached me, or why this paper was thus placed

in my hat, and I was greatly embarrassed thereby, and immediately reported what had occurred to the foreman of the jury and also to one of the bailiffs in charge of the jury. I in no way invited or solicited the writing aforesaid or what is apparently therein referred to.

I further depose and say that after the court advised the jury not to discuss the merits of the case on trial before us until the conclusion of the trial, just after the adjournment of court on a day when the defendant was upon the witness stand and his evidence unfinished, which evidence he resumed on the following morning, one of the jurors, Oliver J. Briggs, said: "I am a Freemason; the defendant Bram is not a Freemason; he is a hypocrite." That this statement by Briggs was in the presence and hearing of several of the jurors and was addressed to them.

I further depose and say that meals were served to the jury in the jury room; that two waiters and two bailiffs also entered the room
148 and were with the jury during the serving of meals in the jury room; that on the afternoon or evening of the first day of January, 1897, after the case had been submitted to the jury and after it had been deliberating upon the case, the two bailiffs in charge of the jury, and a deputy of the marshal of the United States for this district, Mr. McDonald, entered the jury room and there had supper with the jurors.

(Signed) HARRY J. BOOTH.

The above was duly sworn to on 14th January, 1897.

The exhibit annexed to affidavit was a piece of paper on which was written:

"Would you like a ½ pint? If so, give me the tip Sat. morning. I will put it in your pocket. Red."

The aforesaid affidavit of said Booth was typewritten and signed in ink, and when the affidavit was read in court the typewritten words "during their deliberations," in the sentence "I further depose and say that meals were served to the jury in the jury room during their deliberations," were stricken out in lead pencil.

149 [Caption omitted.]

Supplementary affidavit of Harry J. Booth, filed in support of defendant's motion for a new trial.

I, Harry J. Booth, of Hyde Park, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say:

That I was one of the panel of petit jurors before whom the above entitled cause was tried; that after the case had been given to the jury and while we were deliberating thereon, to wit, on Friday evening, January 1, 1897, one of the jurors suggested that an experiment be tried for the purpose of ascertaining whether a man at the wheel of the "Herbert Fuller" could look in at the window of the chart room of said vessel and see anything there; that such experiment was thereupon tried, substantially as follows:

We measured from the bottom of the toilet room door to the glass light in said door to get the height of said chart room window, as it would be from the cabin door, and as it would appear to one on deck; we then marked off on the glass of said door a space representing said window,

the remainder of said glass being then covered with napkins, so that the space representing said chart room window might be clearly defined; we then took two tables, each of which measured about two feet six inches in height, and placed them side by side against said door on the outside; we then marked off the distance from the area representing the window as aforesaid, diagonally on the surface of said tables, to a place representing the position of the wheel, and then measured back from said place
150 representing the position of the wheel the distance to the outside of the partition of the afterhouse, the center of the wheel being designated by a cane. Then two of the jurors went into the toilet room and the gas in said room was turned very low, after which several of the jurors stood at the place on the table designated as the position of the wheel as aforesaid, and looked to see if the figures of the men in the toilet room could be discerned. Before this was done the ground glass of that part of the toilet room door representing said chart room window was made transparent by the application of water. The forms of the men inside were visible.

(Signed) HARRY J. BOOTH.

The above was duly sworn to on January 14th, 1897.

[Caption omitted.]

Affidavit of James J. Connell in support of defendant's motion for a new trial.

I, James J. Connell, of Cambridge, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say: That I know Oliver J. Briggs, of said Cambridge, one of the panel of petit jurors before whom said cause was tried; that I have known him for about nine years; that some time prior to the beginning of said trial, to wit, on or about the fifth day of December, 1896, he, the said Briggs, speaking to me of the defendant, said in language substantially as follows: "There isn't the least
151 doubt but things are looking bad for Bram, and I believe he is guilty."

(Signed) JAS. J. CONNELL, *Cambridge.*

BOSTON, *January 15th, 1897.*

The above was duly sworn to.

[Caption omitted.]

Affidavit of Sylvanus B. Coffin, filed in support of defendant's motion for a new trial in said case.

I, Sylvanus B. Coffin, of Hyde Park, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say that I am well and personally acquainted with Abel C. Ford, of said Hyde Park, one of the jurors in the aforesaid case; that on last Sunday afternoon (January 10th, 1897) the said Ford came to my place of business in Everett Square in said Hyde Park, and while there said Ford engaged in conversation about the recent trial of the aforesaid case. During the conversation Mr. Ford

stated that he, Mr. Ford, said before the trial of said case that the defendant Bram ought to be hung.

(Signed) SYLVANUS B. COFFIN.

The above was duly sworn to on January 15, 1897.

152 [Caption omitted.]

Affidavit of Asa P. French in re defendant's motion for a new trial.

I, Asa P. French, of Randolph, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say that I am of counsel of record for the defendant in the above-entitled cause; that at the time of the empanelling of the petit jury in the said cause I did not know, and had no reason to know, or to believe, that either Oliver J. Briggs or Abel C. Ford, two of the panel before whom said cause was tried, had prejudged the defendant, or had expressed any opinion adverse to the innocence of the defendant.

(Signed) ASA P. FRENCH.

The above was duly sworn to on 19th day of January, A. D. 1897.

153 [Caption omitted.]

Affidavit of James E. Cotter in re defendant's motion for a new trial.

I, James E. Cotter, of Hyde Park, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say that I am of counsel of record for the defendant in the above-entitled cause; that at the time of the empanelling of the petit jury in said cause I did not know, and had no reason to know, or to believe, that either Oliver J. Briggs or Abel C. Ford, two of the panel before whom said cause was tried, had prejudged the defendant, or had expressed any opinion adverse to the innocence of the defendant.

(Signed) JAMES E. COTTER.

The above was duly sworn to on nineteenth day of January, A. D. 1897.

154 This motion came on to be heard, and the proceedings at the hearing and the rulings of the court were as follows:

A preliminary question whether the facts alleged in the affidavits should be shown by the affidavits or by the evidence of the several affiants in open court was first considered, and the decision was that the defendant might put in the affidavits. They were then read.

Witnesses were called and severally testified under various objections as fully stated below.

RINALDO A. JACK, sworn.

Q. (By Mr. COTTER.) Your name is Rinaldo A. Jack?

A. Yes, sir.

Q. Were you foreman of the jury?

A. Yes, sir.

WEBB, J. We recognize him as foreman of the jury.

Q. Did you ever see that paper before [turning to the court]? I am calling his attention to the paper that was annexed to the first Booth affidavit.

Mr. HOAR. Excuse me, Mr. Cotter, but I want to see it.

Mr. COTTER. Yes; I will show it to you before offering it to the court.

WEBB, J. The paper said to have been in the hat?

Mr. COTTER. Do you object——

Mr. HOAR. I object to asking this man any questions as to what took place between himself and any other juror in the jury room, if your honors please.

155 * * * * * * *

COLT, J. You may answer that question.

Mr. HOAR. I have no objection to it.

A. I think Mr. Booth had a paper like that in his hands. I did not take the paper from him, but he read it in his hand.

COLT, J. You will not answer any question, Mr. Jack, until the court rules on it.

The WITNESS. I think that is the paper; yes, sir. I didn't take the paper.

Q. Where did you see it, Mr. Jack?

A. In the jury room.

Q. And when?

A. I think it was on Friday.

Q. Of what week?

A. Of the second week of the trial, I think.

WEBB, J. The Friday of the second week of the trial was Christmas day. It could not have been the second Friday.

The WITNESS. The second Friday was Christmas day. It might have been Thursday, then; I can't say positively; I didn't pay much attention to it.

Q. Might it not have been the first Friday, Mr. Jack?

A. No; I know it wasn't.

Q. It was while the case was on trial?

A. Yes, sir.

Q. Do you remember what witness was on the stand on the day when that was presented to you?

156 A. I do not.

Q. Did you see where Mr. Booth obtained the paper?

A. I didn't know that he had the paper in his possession until yesterday.

Q. No; but when you saw it he had the paper in the jury room?

A. He had the paper in the jury room. He held it in his hand and read it over to me. I didn't take the paper in my hand.

* * * * * * *

Q. Did you see what Mr. Booth did with that paper?

A. I did not, sir.

Q. Did he speak with anybody else in your presence about it?

A. No, sir.

Q. Now, did you fit up a part of the jury room for the purpose of trying experiments?

Mr. HOAR. I object.

COLT, J. Do not answer. What was the question, Mr. Cotter?

Mr. COTTER. Did you fit up any part of the jury room for the purpose of trying experiments in the jury room and applying the evidence in this case to them?

Mr. HOAR. I object, and I would like to be heard on the question of law involved.

* * * * * * *

157 Q. (By Mr. COTTER.) I remember, Mr. Jack, the question put to you was in regard to experiments tried in the jury room; and will you tell us whether there were any?

A. Yes, sir; we tried an experiment there.

Q. You may state what was done.

A. I don't know as I can give you the exact idea about it. We got a couple of tables there and took the measurements from the plans of the "Herbert Fuller," and set up a couple of tables inside of the toilet-room door and measured off a plate of glass the same size of that of the "Fuller."

Q. You may state the size, Mr. Jack.

A. 11 by 16, the glass was.

Q. And where was that glass?

A. In the toilet-room door.

Q. Did you cover over the remaining part of the pane of glass?

A. Yes, sir.

Q. With what?

A. With a napkin.

Q. Did you use anything else than the napkins and the table?

A. Not there in that room.

Q. Did you anywhere else?

A. We used a rule, two men in-side—one had the imaginary axe in his hand.

Q. Had a what?

A. Had a stick in his hand, as if striking a blow.

158 Q. Where was that stick obtained?

A. It was a rule which we took off from the table.

Q. And how far were you away, or were the people who made the observations away from the person who held the rule?

A. Six or seven feet.

Q. Were they on the same or on a different elevation?

A. On the same elevation that we took the measurement from the plan.

Q. Whether both persons were on the same elevation—that is, the person who held the rule and the person who made the observation?

A. One was a kind of sitting down on the floor, which would bring his head up about two feet from the floor; the other was standing up.

Q. Was the floor of the jury room and the floor of the toilet room on the same elevation?

A. It is on the same level, those two floors, but we were standing on the table.

Q. And did you use something to represent the wheel?

A. No, sir; we had an imaginary wheel.

Q. What was that?

A. A cane was laying down to the shaft of the wheel, and then we stood over that, on the side of it, and held our hands out like that [indicating] on the imaginary wheel, and held them there.

159 Q. Where was that cane obtained from?

A. I think that was right there in the jury room; it had been there all through the trial.

Q. Where did the napkins come from? Were they there through the trial?

A. They were there in the jury room.

Q. Through the trial?

A. They were some which were there while we were having our lunch there the past week or two; some napkins were laying there all the time; we used them for towels when we got short—took the napkins for towels.

Q. Do you remember when it was you tried these experiments which you have mentioned?

A. As near as I can recollect, I think it was about ten o'clock at night.

Q. Friday night?

A. Yes, sir.

WEBB, J. Did he state what night?

Mr. COTTER. Friday night, your honor, on the night of the first day after the case was submitted to the jury.

Q. That is our understanding, Mr. Jack?

A. Yes, sir.

Q. How long had you and your associates, or some of you, been trying or testing the experiment?

A. Well, we had been looking over the plans there, and one or two of the jury proposed to rig up the imaginary deck there, and chart room, and see if we could see through the window.

160 Q. Did you use anything to represent the curtain—the curtain on the inside of the glass?

A. No, sir; we did not.

Q. The wire?

A. No, sir.

Q. Did you use anything to represent a cot?

A. No; we did not. The man sat down so as to bring his head about the height of a cot from the marble floor.

Q. What light did you use?

A. We used the gas burner in the farther end of the toilet room, turned very low.

Q. How far was the man inside from the gas; do you know?

A. Well, within five or six feet of it.

Q. Now, in regard to this piece of paper—I will advert to that again—in regard to that piece of paper that your attention was called to yesterday. Did you observe or notice where Mr. Booth obtained that paper?

A. I did not.

Q. Well, without giving the conversation, I will ask you if he told you——

Mr. HOAR. Excuse me.

Mr. COTTER. I asked him not to give the conversation.

Mr. HOAR. What was your question before that?

Mr. COTTER. I asked him first to state what he told him.

* * * * * * *

161 Q. Did Mr. Booth tell you where he obtained that paper?

A. He did.

Mr. COTTER. If your honors please, while at the outset I was inclined to think that I would not put the other question, yet, after conference with my associate, we think that there are grounds for asking the question.

COLT, J. You may ask the question, but Mr. Jack will not answer it until it has been ruled upon.

Q. Where did he state he obtained the paper?

Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. And I will ask your honor to save the exception.

COLT, J. Exception reserved. Judge Webb suggests that there are no exceptions, perhaps; it is within our discretion.

WEBB, J. In this matter addressed to the court for a new trial, for reasons stated, there are no exceptions; we will exclude it, at all events.

COLT, J. We will exclude it, at all events, and we will reserve your exception, Mr. Cotter.

Mr. COTTER. Yes, your honor.

Q. Did you see Mr. Booth speak with one of the officers at that time or immediately afterwards?

Mr. HOAR. Excuse me, Mr. Cotter.

Mr. COTTER. I asked him if he saw Mr. Booth speak with one of the bailiffs (I called him one of the officers)—one of the bailiffs.

162 Q. Immediately or within a short time after your attention was called to the paper.

A. I did not, sir.

Q. Before this case was finally submitted to the jury, did the juror, Briggs engage in conversation with you, or in your hearing, in reference to the defendant?

Mr. HOAR. I object.

COLT, J. Mr. Cotter, the court determines to exclude the evidence—the conversation between one of the jurors and another juror as to matters which took place in the jury room.

Mr. COTTER. It is understood, if your honors please, that this was before the case was finally submitted to them.

COLT, J. I under-stand that—we understand that.

Mr. COTTER. Yes; after the court had advised the jury not to engage in any discussion. And we will ask your honor to note our exception to the exclusion.

COLT, J. The stenographer will note the exception.

PATRICK H. CONCANNON, sworn:

Q. (By Mr. COTTER.) What is your name in full?

A. Patrick H. Concannon.

COLT, J. A little louder, please.

A. Patrick H. Concannon.

Q. (By Mr. COTTER.) What is your business?

A. Printer.

Q. Where do you live?

A. 48 Mt. Auburn st., Cambridge.

163 Do you know Oliver J. Briggs?

A. I do, sir; I have known him for eight or ten years.

Mr. COTTER (addressing witness). Keep your voice a little higher.

A. I do, sir; I have known him eight or ten years.

Q. You meet him frequently?

A. Yes, sir.

Q. Do you almost daily?

A. Well, no; probably two or three times a week; some weeks would not meet him at all.

Q. Do you frequently dine together?

A. We have, sir.

Q. Before the 14th of December did you have a conversation with Mr. Briggs in relating to this case of Thomas M. Bram?

A. I don't remember that I had, sir.

Q. Were you present when he engaged in conversation with someone about the case?

A. Not to my knowledge; I don't remember his ever making any statement on the case.

Q. Have you met together up at a restaurant kept by one Tomfohrde on Court st.?

A. Yes; we have met there.

Q. Can't you recall a conversation had with you or in your presence by Mr. Briggs, in which Mr. Briggs took part, about this case, the case of Bram.

A. I do not, sir.

164 Mr. HOAR. When, might we ask you?

Mr. COTTER. Well, I am asking.

Q. If any time before?

A. I never remember of Mr. Briggs making any statement in front of me.

Q. In front of you?

A. Yes, or in my presence.

COLT, J. (To the clerk of the court.) Where is that affidavit?

Mr. HOAR. The clerk has it, I suppose—the affidavit.

COLT, J. Is that in the affidavit?

Mr. HOAR. No, sir; no, sir.

Q. (By Mr. COTTER.) Have you stated within three weeks, Mr. Concannon, that you did hear Mr. Briggs make a statement in regard to Bram?

Mr. HOAR. Can he go into a cross-examination of his own witness?

Mr. COTTER. I am refreshing his recollection.

A. I don't remember any such statement.

Q. Are you positive you did not make such a statement?

A. I would not be positive, but I don't recollect any such statement.

Q. Might you not have made such a statement?

A. Possibly, but not to my recollection.

Q. If you made such a statement, is it true?

WEBB, J. One moment, Mr. Cotter. We allowed you to go far enough with your own witness on that.

165 Mr. COTTER. I may say, your honor, that I am aware we are taking some liberty.

* * * * * * *

Q. Well, I will put this question: Do you remember of saying within three weeks, "Oliver Briggs ought not to have served on that jury. I

was surprised when I found he had served there in consequence of the talk that we had."

A. I don't remember any such statement.

Q. Might you not have made such a statement, in substance?

* * * * * * *

WEBB, J. (To witness.) You may give your recollection.

A. I don't remember making any such statement.

Mr. COTTER. Yes.

* * * * * * *

Q. How positive are you that you did not say that, in substance?

A. I am pretty positive that I never made no such statement.

EDGAR O. BEAN sworn.

Q. (By Mr. COTTER.) What is your name in full?

A. Edgar O. Bean.

Q. Bean?

A. Yes, sir.

Q. And where do you live?

A. I live in Somerville, Mass.

166 Q. What is your business?

A. I am a reporter on the Boston Journal.

Q. Do you know Oliver J. Briggs?

A. I do.

Q. Did you see him on or about the 2d day of January?

A. Yes, sir.

Q. Of this month?

A. Yes, sir; I saw him in the evening.

Q. Where did you see him?

WEBB, J. Of which day?

Mr. COTTER. The second.

WEBB, J. You said, "or, or about."

Q. What evening was that?

A. Saturday, January 2d, 1897.

Q. About what time?

A. I saw him at his home in Cambridge between ten and eleven o'clock.

Q. And was anyone with you?

A. Well, I went to the house alone, but I met another reporter there, who had preceded me.

Q. Do you know his name?

A. Yes, sir.

Q. Give it to us.

A. John Whorisky.

Q. John Whorisky?

A. Yes.

Q. Was Mr. Briggs there when you went to the house?

167 A. Not when I called; no, sir.

Q. Did you see him that night?

A. I did, sir.

Q. Where?

A. I saw him in the sitting room of his own house.

Q. Did you have a conversation with him in relation to this case?
A. I did, sir.
Q. And did you make notes?
A. I made some notes; yes, sir.
Q. Yes. Now, you may state what was said by Mr. Briggs in relation to this case.
Mr. HOAR. I object.

* * * * * * *

Mr. COTTER. If he goes on to state the attitude of the jurymen as bearing upon his bias at the time that he was called, so long as we have some evidence—and we have some evidence that he made a declaration of bias before——
WEBB, J. I think, Mr. Cotter, your questions should be more distinct, brought down near to some specific subject without leading.

* * * * * * *

WEBB, J. That is too broad.
Q. State what was said by Mr. Briggs as to his views of the case before it was fully submitted.
Mr. HOAR. No; I object to that.

* * * * * * *

168 WEBB, J. If he said anything in regard to his views or opinions of his determination prior to being put on the jury we will allow you to do that. We have once gone over that matter. But your question is asking what he said as to his frame of mind or disposition in the case prior to serving or being sworn as a juror.
Mr. COTTER. If your honor so limits it we submit. You will allow our exceptions.
WEBB, J. I do not think you are entitled to an exception at this stage of the case, but you may make a memorandum that you claim it, and if you are entitled to it you will be protected.
Mr. COTTER. Yes. In order to avoid any possible misunderstanding and so that there will not be any difficulty about the exception, your honors—of course we are not making any statement before the jury now—I will state that we expect to show, that I expect he will testify, that on this night he saw the juror, and that the juror made manifestations of wrath and anger; that he said he desired to be present at the hanging of the defendant, and wished to knock the blocks away from under his feet; that his mind was made up for about a week. I may not have the language exact. That is the substance of what we will show.
The district attorney was allowed to read to the court the stenographic report, as follows, of the said juror Briggs's examination upon his voir dire:
169 "Are you related to the prisoner at the bar, or to the deceased captain, Charles I. Nash?
"A. I am not.
"Q. Have you any interest in this case?
"A. No, sir.
"Q. Have you formed or expressed any opinion in relation to it?
"A. No.

"Q. Are you sensible of any prejudice or bias in relation to it?
"A. No, sir.
"Q. Have you any opinion which precludes you from finding a prisoner guilty of an offence punishable with death?
"A. I have not.
"COLT, J. Any questions by anybody?
"Mr. HOAR. I have none.
"Q. (By Mr. COTTER.) What is your business?
"A. Carpenter and builder.
"Q. And your place of business?
"A. Cambridge.
"A. Are you doing business on your own account?
"A. I am.
"Q. How long have you lived in Cambridge?
"A. About fourteen years.
"Q. In what part of Cambridge?
"A. North Cambridge, Harvard Square; up around that way.
170 "Q. Have you read the newspaper reports of this case?
"A. Partially.
"Q. Have you formed any opinion from your reading of them?
"A. No, sir.
"Q. None that would interfere with your following the evidence?
"A. No.
"Mr. COTTER. We accept him.
"The customary oath was administered to the juror in regard to the performance of his duty.
"This ended the examination of the voir dire."

* * * * * * *

COLT, J. We will hear you further if you have anything to say.
Mr. COTTER. I do not think of anything further, if your honor please.
COLT, J. We will hear Mr. Hoar then.
Mr. HOAR. I wish at once to call attention to the fact that this moment the defence has filed an affidavit in this case of the very witness that they have just had on the witness stand. Now, I wish to call your honor's attention to the fact——
Mr. COTTER. We have not offered that affidavit, and we have made no comment upon it.
COLT, J. Has the affidavit been filed?
Mr. COTTER. Yes, your honor.
Mr. HOAR. It has just this minute been filed. I will agree
171 with Mr. Cotter that I will not comment on it, but I want your honors to understand now that an affidavit of this witness has been filed, and if it is not offered in evidence I want your honors to know it so that I may have an opportunity to discuss that affidavit when the proper time comes.
COLT, J. We have admitted in this case the affidavit of Mr. Connell as to what one of the jurors said previous to the trial of the case, which would relate to the question of whether he had prejudged the case or not. Any further evidence which relates to what the juror said previous to the trial will also be received by the court, but any expression of opinion after the trial that any of the jurors may have made to third parties, as

to his state of mind during the progress of the trial, or as to his state of mind at the conclusion of the trial, the court will reject upon grounds of public policy.

Mr. COTTER. We will ask your honor to save our exception.

COLT, J. The exception may be noted, the same as the other exception was noted.

Mr. COTTER. Without discussing it, if your honor please, I have in my hand now the affidavit that the district attorney alluded to, and I submit that it is setting forth substantially what I stated——

COLT, J. Will you pass it to the court?

The affidavit was passed to the court, a copy of which affidavit is as follows:

172 [Caption omitted.]

Affidavit of Edgar L. Bean, of Somerville, in the county of Middlesex, in said district, in the above-entitled prosecution:

I, Edgar L. Bean, of Somerville aforesaid, being of full age, on oath depose and say: That I know Oliver J. Briggs, one of the panel of petit jurors which returned a verdict in the above-entitled prosecution; that since the trial and on the day of the rendering of the verdict aforesaid, to wit, on or about the second day of January, 1897, I had a conversation with the said Briggs at his house, during which he said: "My mind was made up a week ago; in fact, I thought right along that he was guilty. I should like to see him hung; I should like to be present at the hanging and be the one to kick the block from under his feet."

I made notes of the interview and referred to them before making this statement. On the occasion of my said interview with Briggs, I represented the Boston Journal, and so stated to him. A representative of the Boston Globe was with me at the time.

The foregoing was read to and understood by me before signing.

(Signed) EDGAR L. BEAN.

DISTRICT OF MASSACHUSETTS:

The above was duly sworn to on the twentieth day of January, A. D. 1897.

173 Mr. HOAR. I desire to object. I have read the affidavit, and I desire to object to it under the ruling that the court has just made.

COLT, J. After the ruling which the court has just made we must decline to receive this affidavit.

Mr. COTTER. We will ask your honor to note the exception.

COLT, J. The stenographer will note the exception.

WEBB, J. In the noting of the exception let it appear that the affidavit is from the witness who has just been called, from whom it was sought to obtain evidence of this sort upon the stand, and the affidavit was only offered after the court had held that the evidence was inadmissible.

Mr. COTTER. I will state, and should like to have it appear, that the affidavit had been filed previously.

WEBB, J. It appears that the affidavit was filed while the question of the admissibility of the evidence was under consideration by the court.

174 FRANK P. COLLINS, sworn.

Q. (By Mr. COTTER.) What is your name?
A. Frank P. Collins.
Q. And do you reside in Boston?
A. I do.
Q. What is your business, Mr. Collins?
A. I am a reporter of the Boston Journal.
Q. Did you see that paper?
A. I did.
Q. And where did you first see it?
A. In the Hotel Savoy, Washington street, Boston.
Q. When?
A. On Saturday evening that the verdict was returned.
Q. In whose hands was it?
A. When I first saw it, it was in Mr. Booth's hands.
Q. Did you take a copy of it?
Mr. HOAR. I object.
WEBB, J. That paper does not purport to be a copy, does it?
Mr. COTTER. No, if your honor please. Well, I will go still further.
Q. You said it was in Mr. Booth's hands, I think?
A. It was when I first saw it.
Q. And did you call my attention to that paper?
A. I did.
Q. And when?
A. The Sunday morning following.
175 Q. And did you have with you a copy of the paper at that time?
A. I did not.
Q. Did you show me a copy of the paper?
A. I did not.
Q. Some time later?
A. Later I did.

WEBB, J. One moment, before that witness retires; there may be a misapprehension on the part of the court. You were asked if you saw that paper. Did your answer apply to that little slip which is attached to the affidavit there or to the whole paper?

The WITNESS. I saw this little slip.

WEBB, J. The whole paper, affidavit, or whatever it is, was passed to him——

The WITNESS. I only saw this small slip of paper.

JAMES C. RUHL, sworn.

Q. (By Mr. COTTER.) What is your name, Mr. Ruhl?
A. James C. Ruhl.
Q. And you are a deputy of the marshal's?
A. I am a bailiff.
Q. And you were one of the bailiffs who had charge of this jury?
A. Yes, sir.
Q. Did Mr. Harrington assist you?
A. Yes, sir; he was one of the assistants.
176 Q. And did he go to and from the jury room with the jury?

A. Yes, sir.
Q. You understood me to refer to Harrington, did you not?
A. Yes, sir.
Q. At any time was your attention called to that piece of paper?
A. Yes, sir.
Q. By whom?
A. By Mr. Booth.
Q. A juror?
A. Yes, sir.
Q. When was it, if you please?
A. Well, I think it was about the second week of the trial; I should say probably a couple of days before Christmas. It was in the second week of the trial, I think.

ISAAC C. HARRIS, sworn.

Q. (By Mr. COTTER.) Your name in full?
A. Isaac C. Harris.
Q. And where do you live?
A. Cambridge.
Q. And your business?
A. Builder.
Q. And your place of business?
A. 574 Massachusetts avenue.
Q. And do you know Oliver J. Briggs?
A. Yes, sir.
Q. Been acquainted with him for some time?
A. 14 years.
177 Q. Do you meet him frequently?
A. Meet him about every morning.
Q. And sometimes in the middle of the day?
A. Most any time we run across one another.
Q. Now, before the beginning, the commencement of the trial of the case of the United States *v.* Bram, did you meet him frequently?
A. Met him every day; about every day.
Q. Did you have a talk with him about the case?
A. No, sir.
Q. Nothing said about the case?
A. Nothing about this case.
Q. The United States *v.* Bram?
A. No; not at that time.
Q. Before the trial, then?
A. Before the trial there was only one thing that I heard Mr. Briggs say in my office one morning when he was drawn on the jury first, and I guess it was——
Q. My inquiry was limited to the case of the United States *v.* Bram.
A. No; before he was ever drawn on the jury of Bram at all, on the petit jury, or whatever it was, he came to my office and said, "I have been drawn on the jury, I see, on the panel." About a week afterwards we got talking, and then he commenced to speak about he was afraid he would be drawn on this Bram jury, and then he said, "I don't care about getting on it, and I shall try to get off of it if I can."

178 Q. Anything said about any opinion?
A. Not anything.
Q. At any time?
A. At any time.

EDWARD P. BARRY, sworn.

Q. (By Mr. COTTER.) What is your name in full?
A. Edward P. Barry.
Q. Where do you live?
A. 154 Dorchester street, South Boston.
Q. What is your business?
A. I am a reporter for the Boston Herald, and editor and publisher of the South Boston Inquirer.
Q. Are you acquainted with Oliver J. Briggs?
A. I have met him; yes, sir.
Q. Did you meet him before the trial of the case against Bram?
A. No, sir.
Q. Were you present when he engaged in any conversation?
Mr. HOAR. When?
Mr. COTTER. Before the trial.
A. No, sir.
Q. Have you engaged in conversation with Mr. Briggs—I will not ask for the conversation—have you engaged in conversation with Mr. Briggs in relation to this case? In relation to the case against Bram?
A. I have; yes, sir.
179 Q. When was that?
A. After the trial.
Q. And where?
A. Must I answer? At the Quincy House.
Q. Can you give us the date?
A. The day the verdict was brought in; Saturday.
Mr. COTTER. Then, I do not care to do—if it is acting in violation or in conflict of any order of the court—I will say that I have not seen this witness, but I am advised that his testimony would be in the same line substantially as that set forth in the affidavit of the witness Bean?
WEBB, J. The same as set forth in the affidavit we refused to receive. The same as you offered to show orally from Bean?
Mr. COTTER. Yes, your honor.
Mr. HOAR. I object.
COLT, J. I think, Mr. Cotter, in order to preserve your full rights you may propound any question you wish, and then the court will reject it, and you can save your exception. You will not answer (addressing the witness). I mean we will rule upon it after the question is asked.
Q. And what time in the day or evening was that, Mr. Barry, that you saw Mr. Briggs at the Quincy House?
A. From 5.30 to 8.30 o'clock.
Q. Was anybody else present?
A. Yes, sir.
Q. You may state who?
A. Juror Burke, Mr. Warren T. Billings, of the Herald, and Mr. Hill, of the Herald; Mr. Jack we saw there for a few moments.

180 Q. And in what part of the hotel did the conversation take place?

A. First in the cafe, and afterwards in one of the private dining rooms.

Q. In that conversation, did Mr. Briggs state what his views of the case were before he was drawn on the jury?

A. I think he said he had——

Mr. Hoar. What——

Webb, J. That question can be answered yes or no.

Q. Answer yes or no.

A. Yes.

Q. Now I will ask you what he said with regard to that?

Webb, J. With regard to his state of mind prior to the trial?

Mr. Cotter. Yes.

The Witness. Not with regard to the state of his mind; he merely said that he had read the trial and followed it closely.

Colt, J. Read the trial?

The Witness. Read the evidence as it was presented in the newspapers previous to the trial.

Q. Did he state anything about any conclusion or view of his?

Colt, J. Previously?

A. Not previously; I didn't talk with him previous to the trial.

Webb, J. For my own information, merely, what report of this evidence was there prior to the trial?

181 The Witness. The story of the crime, the news reports.

Q. Whether or no he stated what impression that made on him—his views on the case—on this occasion?

Webb, J. Now, you must be very careful. The witness should be instructed to confine his answers to what he said about his feelings or state of mind or action prior to the trial, and, having been so cautioned, he should then be permitted to tell what he said, and all he said, and who else took part in it, and how it was called out.

Mr. Cotter. Yes, your honor; I mean that he shall have that opportunity.

The Witness. I can't remember the exact language, because we talked for a good many hours.

Q. Well, state the substance of it.

A. He didn't——

Colt, J. You understand the question, don't you?

The Witness. Yes, sir. In substance he said he was satisfied from what he read before that the prisoner was guilty, but he didn't say—he said he felt as if he could try the cause in his mind honestly and give him the benefit of any doubt—he didn't say that he had determined——

Q. State what he said; that is what we want.

Webb, J. He is not attempting to state what he said at all. He is giving the substance. You said you talked two hours?

The Witness. We talked two hours or three hours.

Mr. Cotter. What we object to is his calling attention to what
182 he says he did not say. It might take a long time for him to do that.

Q. I shall ask to have you state, if you can not give the exact words, to give the substance of what he said on the subject as indicated by the court?

A. It would be a pretty difficult thing to do. I didn't take any notice; it was a general conversation in which five participated, and I can only give the impression that it left on my mind, that is all.

Q. Well, give the substance of what was said.

A. I say I can't.

Q. Well, your best recollection of it.

A. I think Mr. Billings asked him, as near as I can recollect, why he went on the jury.

WEBB, J. Who asked him?

The WITNESS. Mr. Billings, who was one of the Herald men with me; and said that it must have hurt his business a great deal to leave it during the time it was necessary to do the jury duty. He said, yes, it did, and he was not so very anxious to go on, but he was drawn, and I am quite sure that he said that when Mr. Cotter asked him whether or not he had formed any opinion, he said he had. That was something that was left very strongly impressed upon my mind, because—he was not directing his conversation to me at the time—I was talking with Mr. Burke at the time—he was directing his conversation to Mr. Billings—that was the impression I got in overhearing the conversation with Mr. Billings; we were all talking with each other in a general way,
183 sitting around the table. I didn't ask him whether or not he had said that——

Mr. HOAR. Not what you didn't do. We would like to know what was done.

The WITNESS. But that was the impression I got—entirely an impression. I wouldn't say that it was so for a certainty.

Q. Did he state his views of the case or of the defendant afterwards, after he came on the panel—any views that he formed?

Mr. HOAR. I object.

COLT, J. Excluded and exception saved.

The WITNESS. If the court will allow me, the Boston Herald——

Mr. HOAR. I object.

WEBB, J. Well, let us hear what this man has to say in the way of his own personal explanation.

The WITNESS. The Boston Herald's attorney was here, Mr. Henry V. Cunningham, to make an explanation of what occurred, on behalf of those who conversed with the jurymen on that occasion. They held that the conversation was of a private nature, which, of course, the attorney advised me to tell, so far as the court permitted, but in conversing with the gentlemen we conversed as friends—with the jurors—we conversed as friends, and we felt that anything, and assured them that anything, that would be said that they wanted published would be published, and anything that was said that they didn't want published wouldn't
184 be published; and we carried out that part of the agreement, and we agreed that everything that was said that was not published was of a private nature, and, as newspaper men, we kept our agreement.

Q. Yes; and for that reason you didn't care to talk with counsel?

A. No, sir; I wouldn't talk with counsel.

Mr. COTTER. I assigned that as a reason for not being able to get more definite information.

COLT, J. Have you any further questions?

Mr. COTTER. No, sir.

Q. (By WEBB, J.) I understand you to say that that conversation lasted for several hours?

A. Yes, sir.

Q. Did any others take part in it?

A. There were five there, and one of them I have known since childhood.

Q. Were there any other parties there besides those five? Did any by-standers take part in it?

A. Oh, we were in a private room; we were having a little lunch in a private room. We talked down in the cafe with Mr. Sinclair, the proprietor of the house, but not on the case at all.

185 JOHN B. WHORISKEY sworn.

Q. (By Mr. COTTER.) What is your full name?

A. John B. Whoriskey.

Q. (COLT, J.) Please spell the last name.

A. (The witness spelled the name letter by letter.

Q. What is your business?

A. Reporter on The Globe.

Q. Do you know Oliver J. Briggs?

A. I have met Mr. Briggs.

Q. Have you seen him in reference to the case of The United States vs. Bram?

A. I have.

Q. Where did you see him?

A. At his home, Lakeview ave., Cambridge.

Q. Were you there on the occasion described by the witness Bean?

A. I was.

Q. Did you see Mr. Briggs?

A. I did.

Q. Did you engage in conversation with him?

A. I did.

Q. Did he say anything to you in regard to the defendant, or his views of the defendant, or his knowledge of the defendant's case before he was impanelled on the jury?

A. He spoke——

186 Mr. HOAR. No, I think that is capable of an answer, yes or no.

COLT, J. He may answer yes or no.

Q. Did he say anything in respect to his views of the case before the trial, before the 14th of December?

A. I am uncertain as to whether he referred to it before the trial or not.

Q. Will you try to refresh your recollection as to whether he said anything about his condition of mind or his views of the case——

WEBB, J. One moment. What is the date of this?

Mr. COTTER. December 14.

COLT, J. That is the date of the trial.

WEBB, J. January 2, between ten and eleven o'clock at night, is the time Mr. Bean spoke of.

Mr. COTTER. Yes.

WEBB, J. Following the delivery of the verdict.

Mr. COTTER. Yes.

A. He did.

Q. Will you state what he said?

A. He spoke of Bram's record.

Q. What did he say about it?

A. He asked me if I knew Bram's record. I answered that I did not.

Q. (By COLT, J.) Are you confining yourself now to the juror's view before the trial?

Mr. COTTER. Before the 14th.

187 Mr. HOAR. Before the beginning of the trial.

COLT, J. Before the beginning of the trial.

The WITNESS. I am referring to the evening of January 2nd.

Mr. COTTER. What he said in regard to his view before the trial.

Q. (By COLT, J.) Did he say anything in regard to his views before he went on the jury?

A. No; he did not. I misunderstood the attorney. No; he did not.

Mr. COTTER. I may say to your honors, to save time, that I expect this witness, and have positive knowledge in regard to this witness, that his testimony covers matters we offered to show by Mr. Bean.

Mr. HOAR. Have the question asked.

COLT, J. You better ask the question and have it ruled upon.

Mr. COTTER. Yes; very well.

Q. Did he say anything in regard to his views of the case before the case was submitted to the jury?

Mr. HOAR. I object.

COLT, J. Excluded.

WEBB, J. Well, that question—I do not suppose that any of us misunderstand what is meant, but the question is not definite. The phrase "before the case was submitted to the jury," covers a great deal of time, but it means during the progress of the trial.

Mr. COTTER. Yes, sir.

* * * * * * *

188 Q. Did he state to you what his views were concerning the defendant, Bram, or what he did before the case was finally submitted to the jury?

Mr. HOAR. I object to that.

COLT, J. You need not answer. The question is excluded and exception noted.

Mr. COTTER. For the validity of our exception we wish to have it appear on the record what we propose to show at this time. We propose to show that the juror did state, at least a week before, that he was satisfied that this man ought to be hung; that he should like to be present at the execution and be the person to kick the block away from this man's feet.

COLT, J. In substance what was included in the affidavit?

Mr. COTTER. Yes, precisely. That is what I say, your honor.

WEBB, J. Let me see that affidavit.

(Paper handed to Judge Webb.)

COLT, J. The stenographer will take note of that.

WEBB, J. Now, Mr. Cotter, your statement does not correspond with this statement. Of course, it is subject to an interruption that would make it correspond. This statement (referring to paper) does not show that at the time during the trial he concealed that he wished to see him hung; that he spoke of his guilt, seemed to desire to see him hung; that that was his then present sentiment. That may have been stated in some other proceeding. Now, if you undertake to offer to show to prove that he thought that all along—that the man was guilty and ought to be
189 hung—and if he said he thought that all along, that is one thing. That ought to be stated clearly. The ambiguity is to be avoided.

* * * * * *

Q. Did the juror state in that conversation, if at all, when he thought the defendant was guilty?

Mr. HOAR. I object.

COLT, J. Excluded. That can be answered. I will withdraw the objection.

The WITNESS. Read the question.

COLT, J. Will the stenographer read the question?

(The stenographer repeated the question.)

Mr. HOAR. That can be answered yes or no. (After a prolonged pause.) I should like to have the hesitance of the witness appear on the record.

* * * * * *

COLT, J. The witness may take all the time he desires before answering. Take any reasonable time. You understand the question, do you not?

A. I think I do; yes. Not in so many words.

Mr. HOAR. Well——

Mr. COTTER. Well, I will ask you to state the word, but do not answer until the court passes on it.

Mr. HOAR. I will object to that.

WEBB, J. We will hear the question before we rule upon it.

Q. (By Mr. COTTER.) What words did he use in relation to that subject—the subject of the last question.

COLT, J. What question?

190 Mr. COTTER. That last question, desiring to see the defendant hung.

WEBB, J. That was not the question.

Q. (By Mr. COTTER.) What did he say in regard to his conclusion as to the guilt or innocence——

WEBB, J. The question is, did he tell him at what point——

(The question was repeated by the stenographer.)

WEBB, J. As to the time.

Mr. COTTER. Yes, as to the time; state what he said, giving the time, and also what he said in regard to the guilt of the defendant.

Mr. HOAR. I think I shall be obliged to object to that.

WEBB, J. That is not quite in form.

Mr. COTTER. Very well.

Q. What did he say as to the guilt of the defendant——

Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. I understand your honor has excluded the whole of it?

WEBB, J. No; we allowed as to the point of time.

Mr. COTTER. However, for the purpose of saving the law so that there will be no misunderstanding here, I will ask it again.

Q. Did he state when he first formed an opinion as to the guilt of the defendant?

* * * * * * * *

191 The WITNESS. Not to the day.

Q. Did not state the day? Well, did he as to the time?

Mr. HOAR. Answer yes or no.

A. He did.

Q. When was that in reference to the verdict?

* * * * * * * *

A. It was before the verdict.

Q. Did he state how long before the verdict?

* * * * * * * *

COLT, J. You may answer that question without stating the conversation.

A. He did.

Q. You may state what it was.

A. Within a week.

WEBB, J. He did not fix it.

Mr. COTTER. Within a week, he says.

WEBB, J. Within a week?

Mr. COTTER. Yes.

Q. Did he say anything in regard to newspaper reports before?

WEBB, J. Well——

Q. Did he say anything in regard to his condition of mind before, and how his mind was affected from the reading of newspapers or other reports?

A. Not to my knowledge.

* * * * * * * *

192 Q. (By Mr. COTTER.) What did the jurors say; what did Mr. Briggs say, if anything, in regard to being present at the execution or the hanging of the defendant?

Mr. HOAR. I object.

COLT, J. Excluded and exception.

EDWARD P. BARRY, recalled.

Q. (By Mr. COTTER.) Were you coming up on the elevator with Juror Briggs sometime during the progress of the trial?

A. I was not.

Q. You were not?

A. No.

RINALDO A. JACK, recalled.

Q. (By Mr. COTTER.) Mr. Jack, after the jury was empanelled in this case, was a physician called to attend any member of your panel?

A. Yes, sir; there was.
Q. When?
A. I think it was the Sunday after Christmas.
Q. And where did the physician attend the juror?
A. At the Quincy House.
COLT, J. A little louder, please.
The WITNESS. At the Quincy House.
Q. Do you know who the physician was?
A. I do not, sir.
Q. And which juror did he attend?
A. Mr. Green.

* * * * * * *

193 Q. After the jurors left the court room on one of the days when the defendant was on the witness stand, did the juror Briggs engage in conversation in regard to the defendant?

Mr. HOAR. I object.

WEBB, J. The question is, with whom, whether he was engaged with one of his fellows, that is one thing.

Mr. COTTER. Yes, he did, with some of the jurors, your honor.

Mr. HOAR. I object.

COLT, J. With one of his fellow jurors?

Mr. COTTER. With one of his fellows, one or more.

COLT, J. Excluded.

Mr. COTTER. Note the exception.

Mr. COTTER. And I wish to state here to the court, so that it will appear on the record what we propose to show. I will do that, or put a specific question to the witness, as your honors may direct.

COLT, J. You had, perhaps, better ask the question, Mr. Cotter.

Q. Did the juror Briggs say that he himself was a Freemason and that the defendant was not?

Mr. HOAR. I object.

WEBB, J. One moment—you have left out the qualifying part of that question.

Mr. COTTER. Yes; to the juror.

WEBB, J. To one of the other jurors.

COLT, J. Do you object, Mr. Hoar.

194 Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. We ask that the exception be noted to that.

Mr. HOAR. I object on another ground. I object to the form of the question.

WEBB, J. You need not trouble about amending the form. We exclude the evidence without regard to the form.

Q. Did the juror Briggs state to you or to other of the jurors, "The defendant is a hypocrite?"

Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. And we except.

Q. Did the juror Briggs state to you or any of his fellows in your presence before the case was finally submitted to the consideration of the jury, "I should like to see that man hung?"

Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. And we except.

Q. How long was this physician with the juror, Mr. Green?

A. I should judge he was there ten or fifteen minutes alongside of him with the officer in charge.

Q. Did he leave anything with the juror—hand him anything?

A. Not anything at all in my presence.

Q. Were you present all the time?

A. I was there in the room; I was right around there where they were.

195 Q. Were you giving any attention to the juror and the physician?

A. I was listening to what the remarks of the doctor were, that is all.

Q. Were you giving any special attention to what transpired between them?

A. No, sir; I was not.

Q. Might there not something have passed between them without your noticing it?

WEBB, J. Are you cross-examining your own witnesses?

Q. Were you in a position to see and did you see all that took place between them.

A. I was in a position to see all that took place.

Q. Yes, and did you?

A. I was standing right by there; yes, sir.

Q. What special attention, if any, were you giving to them, if any?

A. Well, I was a little mite interested to find out what the matter was with him.

Q. And did Mr. Harrington assist the bailiffs in taking care of the jury? You know to whom I have reference.

A. At the hotel?

Q. Here or anywhere?

WEBB, J. He was one the bailiffs of the Government and sworn to attend them.

Mr. COTTER. We merely wish to show that he did act and that he was sworn.

196 WEBB, J. The record shows that he did.

* * * * *

Q. You may state what Mr. Harrington did in the way of aiding or caring for the jury.

A. Well, he accompanied us from the jury room to the hotel—to the hotel office, and left us in the office. He did not go into our jury room at all—to our quarters.

Q. Did he go up to the jury room up stairs?

A. No, sir; I never saw him there.

Q. Did any of the officers go into your jury room—I mean at any time?

A. Well, which do you refer to; our sleeping room or the dining room?

Q. No; I mean the rooms in this building.

A. In this building?

Q. Yes.
A. No, sir; only when we were at lunch.
Q. How frequently did they join you at lunch?
A. About one o'clock.
Q. Every day?
WEBB, J. He asked you how often.
A. They were there every day at lunch at one o'clock. They had their lunch with the jury.
Q. And what officers?
A. Mr. Ruhl and Capt. McGonagle.
Q. Anybody else?
197 A. I think Mr. Macdonald—Marshal Macdonald.
Q. After the case was submitted to you for your final consideration, and before you returned the verdict, did you dine with the officers?
A. When we took the case to the jury room, we dined before we had anything to do with any part of the case at all.
Q. Were the officers with you?
A. They were there at lunch. We done nothing with the case until the officers and everyone was out of the jury room.
Q. My question was, did the officers sit down at the same table with you to eat?
A. They sat down at the same table to eat in the jury room.
Q. Did they after you began to deliberate on the case?
A. No, sir.
Q. Didn't they afterwards? Didn't you have a meal on the following day?
A. Not until the verdict was delivered.
Q. The case was given to you on Friday about one o'clock. You had dinner immediately upon retiring to your room?
A. Yes, sir.
Q. Before you began to consider the case?
A. Yes, sir.
Q. Then didn't you have some supper that night—Friday night?
A. Yes; I think we had a lunch there; yes.
Q. Well, were the officers present?
198 A. I don't know but they were; I could not swear to it.
Q. What is your best recollection, Mr. Jack?
A. Well, I could not say.
Q. You mean that you have no recollection on that?
A. I do not recollect whether the officers were there that night or not.
Q. How was it the following morning when you had breakfast?
A. Well, I could not say whether they ate with us that morning, or whether they had their breakfast taken out to them. I could not swear to it because I did not take any note of it.
Q. Have you any recollection whatever?
A. No; I have not.

WARREN M. BLAKE, sworn:

Q. (By Mr. COTTER.) Your name in full, Mr. Blake?
A. Warren M. Blake.
Q. And you were one of the jurors?

A. I was.

Q. Now, do you remember after the case was submitted to you on Friday, the first of January, when you went to your jury room and had lunch or dinner, whether the officers joined you?

A. I think they did the first meal; I am quite sure they did.

Q. And any officers other than the two bailiffs?

A. I think the deputy marshal, the large man, I think his name is Macdonald.

199 Q. Mr. Macdonald?

A. Mr. Macdonald; I think he was in there.

Q. Now, do you remember at what hour supper was served that night?

A. No, sir; I do not.

Q. Was that served in the jury room?

A. Yes, sir; I think it was.

Q. And were there any other people present than the officers?

A. I don't remember that.

Q. And did the officers join you that night at supper?

A. I could not say whether they did or not. I don't remember about that. I sat in the middle of the table, and I did not take much notice about that. I could not really say.

Q. Well, have you any recollection as to whether the officers joined you afterwards—I mean except on this one occasion, Friday, about the noon hour—that is, after the case was given to you, between that time and the time you returned your verdict the officers were with you in the room?

A. I don't remember that they were at any other time; they might have been.

Q. Do you mean to say that you have no recollection on it?

A. I have no recollection as to that point.

Q. And do you remember the occasion when the physician was called in?

A. I do; yes, sir.

200 Q. And how near were you to Mr. Green at that time?

A. Well, Mr. Green, I think, was lying on some chairs—a sort of improvised couch—near the radiator as you went into the door, and I sat there in the middle of the room. It was quite a long room. I was reading, I think, at the time the doctor came in.

Q. What attention, if any, were you giving to what transpired or occurred between Mr. Green and the doctor?

A. I gave no special attention, except glanced up now and then.

JAMES C. RUHL, recalled.

Q. (By Mr. COTTER.) Mr. Ruhl, did you report to either the defendant or any of his counsel that you saw or knew anything about the paper that I called your attention to this morning on the stand?

A. No, sir.

Q. Now, after this case was submitted to the jury on Friday I wish to know if you and the other officials—you and your associates—were present when the jurors took their meals?

A. Yes, sir; every meal.

Q. And what persons were present?

A. Officer McGonagle, Deputy Marshal Macdonald, and myself.

Q. And in the jury room?

A. Yes, sir; and also the two waiters.

Q. (By WEBB, J.) Two what?

A. Two waiters.

201 Q. (By Mr. COTTER.) Did you sit at the same table with the jurors—two waiters?

A. Yes, sir.

Q. Where did the waiters come from?

A. The Quincy House.

Q. How many meals were served between the time the case was finally submitted to the jury on Friday—that is, about one o'clock—and when they reported into court, when they returned their verdict?

A. There was dinner and supper and breakfast.

Q. There were three meals?

A. Yes, sir.

Q. And were all these persons whom you named present at these meals?

A. Not all the time. I could not swear that Mr. Macdonald attended the last meal. The waiters went out in the corridor there. The waiters provided the meals and set them on the table, and then we asked them to step out.

Q. Did the waiter enter the room where the jury were?

A. Yes, sir. He had to do it in order to get the stuff out of there and to put it in there. That was the only way.

Q. How many times did he visit or enter that room?

A. I should say during the three meals once each time.

Q. He went in to prepare *the* serve the meals?

A. Yes, sir; and to take them out.

202 Q. How long did he stay there on each occasion—the two of them? I believe there were two of them.

A. I could not say; probably fifteen minutes—fifteen minutes to half an hour.

Recross-examination:

Q. (By Mr. HOAR.) Mr. Ruhl, did you report the fact about that little slip of paper to anybody in connection with my office?

A. No, sir; I did not until last Tuesday, I think it was.

Q. Last Tuesday?

A. Yes, sir.

Q. Were the officers in the jury room all the time the waiters were?

A. Yes, sir.

Q. Was there any communication between the waiters and the jurymen?

A. No, sir.

Mr. COTTER. We desire to object to that.

WEBB, J. On what ground?

Mr. COTTER. We claim, if your honor please, the significant fact is that strangers, or foreigners—people, I do not mean under the sense of another nationality, because that might apply to me, but people who did not belong in that jury room—that they were there.

WEBB, J. The Government may show just what happened, you having opened the matter.

203 COLT, J. Whatever happened between the third parties and the jurors we have admitted, and we think it proper for the Government to show what happened. Do you object to the question?

Mr. COTTER. Yes.

COLT, J. Very well.

Mr. COTTER. Be good enough to note our exception, that our rights may be saved.

JOHN B. WHORISKEY, recalled.

Q. (By Mr. COTTER.) Mr. Barry, you remember being on the elevator with juror Briggs during the progress of the trial?

WEBB, J. What is this witness's name?

Mr. COTTER. He testified before, your honor.

WEBB, J. What is his name?

Mr. COTTER. Mr. Barry.

A. Edward P. Barry. No, sir; I was not on the elevator.

Q. You were not? Did you see juror Briggs on the elevator?

A. No, sir; not during the trial.

Q. During the trial. Well, during the trial did you see him—did you see him have a newspaper?

A. No, sir.

Q. Did he tell you that he had one during the trial?

A. No, sir; not during the trial.

Q. Did you have any talk with him in regard to a newspaper?

A. Yes, sir.

Q. You may state what it was.

Mr. HOAR. I object.

204 Q. I will ask you if you had a talk with him in regard to a newspaper that he had or read during the trial?

A. Yes, sir.

Q. Now I would like to have you state what that was.

COLT, J. You may answer.

A. In the course of my conversation with him at the Quincy House he said in going up the elevator one day he found a newspaper. He put the newspaper, I think he said, into his pocket. He was very anxious to learn what was going on in the outside world; that he remembered his oath, and that he turned that newspaper over to one of the officers. Whether or not he went into the jury room I do not know. He turned the newspaper over to one of the officers.

Q. (By WEBB, J.) Not reading it?

A. I am quite sure that he said the temptation was great, but that he did not accept of it—something to that effect.

Q. Did he say anything about seeing the paper more than once?

A. If I remember rightly, he said he knew the name of the paper.

Mr. HOAR. That is not the question; that is not responsive.

The WITNESS. He took up the paper, if I remember rightly, and I think he said, "Put it in his pocket." I think the question was put to him, "Did you read it?" He said, "The temptation was great," and he turned it over to the officer. If I remember rightly, he said he turned it over to the officer within 15 minutes, or within a very short time.

205 DANIEL W. BOND, sworn.

Q. By Mr. COTTER.) Your name is Daniel W. Bond?

A. Yes, sir.

Q. And where do you live?

A. Woburn.

Q. What is your business?

A. Leather manufacturer.

Q. Did you serve on the jury of this court for the October sitting?

A. Yes, sir.

Q. And do you know Oliver J. Briggs?

A. Yes, sir.

Q. Was he one of the jurors with you?

A. Yes, sir.

Q. You served at the trial of civil causes, did you not?

A. Yes, sir; and criminal. He did serve on the jury with me.

Q. Did you have any talk with regard to the case of Bram while you were serving on the other jury with Mr. Briggs?

A. Yes, sir.

Q. To what extent was the case discussed between you?

COLT, J. Was this prior to December 14th?

Mr. COTTER. Yes, your honor, prior to December 14th.

The WITNESS. Well, there wasn't much said. I had some talk with the juror Briggs in regard to the case.

Q. Yes. You may state what was said.

A. Well, as near as I can. I asked Mr. Briggs if he was willing to serve on a case of capital punishment; and we also had some talk in regard to the defendant, Bram, and I asked him——

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Q. You may state what was said.

A. I can't remember exactly what was said; I can tell the substance.

Q. The substance.

A. Whether the reports as they came in the paper—whether he thought the man was guilty or not. And I said I didn't see how any man could look at it otherwise from the reports in the paper, and, as I remember it, he thought as I did.

Q. Do you remember that was during the time when we had a hearing on the preliminary question, just after the indictment was returned, when there were some publications in the papers about a hearing in this court?

A. I don't remember, sir, when that was.

Q. When did you begin your service on the jury, Mr. Bond?

A. My impression is, I think the 19th of October; I will not be sure about that. I beg your pardon, it was November.

COLT, J. The term began on October 15th. I think the petit jurors were summoned in on the 1st of November.

Q. And you remained in service up to what time?

A. I don't remember; I got excused.

Q. Before the trial of this Bram case?

A. Yes, sir.

Q. Can you state more definitely, Mr. Bond, when you had this conversation which you described with Mr. Briggs?

A. No, sir; I can not. It was after I was excused.

Q. Did Mr. Briggs serve on the same jury with you?

207 A. Yes, sir.

Q. Were you foreman of that panel?

A. Yes, sir.

RINALDO A. JACK, recalled.

Q. (By Mr. COTTER.) In the presence of all the jurors and before the case was submitted to them—before the charge was delivered—did Mr. Briggs state that he made Masonic signs to the defendant and that he did not respond?

Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. And note the exception, Mr. Stenographer.

Q. Did Mr. Briggs state in the presence of all the jurors, after they were empanelled and before the case was finally submitted to the jury and before the charge was made, that he, Mr. Briggs, was a Mason, and that the defendant was not, and that the defendant was a hypocrite? Did he make the statement to all the jurors?

Mr. HOAR. I object.

COLT, J. Excluded.

Mr. COTTER. And note the exception.

Q. Did he state immediately upon entering the jury, after the case had been submitted to the jury and they had retired for deliberation, in the presence of all the jurors, that he should like to be present at the execution of the defendant?

COLT, J. Excluded.

208 Mr. COTTER. And we ask that the exception be noted. Those are the questions, your honors, that I asked before in regard to those individuals, one or more.

COLT, J. Mr. Hoar——

Mr. HOAR. Is that your case?

Mr. COTTER. Yes.

Then, at defendant's request, the stenographer, WALTER ROGERS, was called.

Q. (By WEBB, J.) Did you act as stenographer during the testimony of Daniel W. Bond yesterday afternoon?

A. Yes, your honor.

Q. Will you read from your minutes of the testimony—your original stenographic minutes—beginning, if you find the place, "Well, as near as I can"——

A. Yes, your honor.

Q. "I asked Mr. Briggs if he was willing to serve on a case of capital punishment."

A. Yes, sir.

Q. "And I asked him"——

A. Then there was a break off. Then the next question was, "You may state what was said." The answer to that is, "I can't remember exactly what was said; I can tell the substance." Then the question was, "The substance?" The answer to that question is, "Whether the reports as they came in the paper—whether he thought the man was guilty or not. And I said I didn't see how any man could look at it

otherwise from the reports in the paper, and, as I remember it, he thought as I did."

209 Q. You read it exactly as it is there?

A. Precisely, your honor.

WEBB, J. Then there is no correction to be made of the answer. You may interrogate him.

Mr. COTTER. I do not care to question him; I asked permission to call him. That is not our recollection of Mr. Bond's testimony, and Mr. Bond upon being interviewed——

WEBB, J. You may recall Mr. Bond.

DANIEL W. BOND, recalled.

Q. (By Mr. COTTER.) Now, Mr. Bond, I should like to have you state as exactly as you can and as fully as you can the conversation between yourself and Mr. Briggs——

WEBB, J. No; I do not think that is correct. He ought to state the conversation as related yesterday.

Mr. COTTER. With your honor's permission, I will ask Mr. Bond to state.

Q. You may state what you said yesterday in regard to the interview with Mr. Briggs.

A. I had a conversation with——

WEBB, J. Remember, you are only to tell as you told it yesterday, not as you recollect it this morning—how you recollect your yesterday's statement.

A. I had a conversation with Mr. Briggs. I asked him if he was willing to go on a case of capital punishment. I also said I did not see how any one having read the reports in the papers could think other-

210 wise than *e*hat he was guilty; and, as I remember it, he thought as I did.

The district attorney then called ABEL C. FORD, the juror referred to in the affidavit of Sylvanus B. Coffin.

Mr. FRENCH. In order to save our rights we desire to raise a question of practice and to object to the admission of any testimony by the district attorney on the present condition of the record.

WEBB, J. You object to any testimony to meet your case?

Mr. FRENCH. No, your honor; that is not the point.

WEBB, J. What is it?

Mr. FRENCH. We object that the record raises no issue. We have a right to assume from the record that there would be no contradiction of the statements made by our affidavits. We simply desire to raise the question at this time, if your honor please. A single word in amplification of what I have already suggested. It seems to me that there is no issue joined between the defendant and the United States upon the questions of fact raised in our motion—no issue upon the record.

COLT, J. We believe the evidence to be admissible, and you may proceed, Mr. Hoar.

Mr. FRENCH. Your honor will save the exception.

COLT, J. The exception may be noted.

WEBB, J. The understand' is that it is an exception to any evidence, but not to this specific evidence.

Q. (By Mr. HOAR.) Your full name is?

A. Abel C. Ford.

211 Q. And you reside?

A. In Hyde Park.

Q. And you were one of the jurors at the trial?

A. I was.

Q. You know Sylvanus B. Coffin?

A. Slightly acquainted with him.

Q. What is his business?

A. He keeps a cigar and confectionery and paper stand there in Hyde Park.

Q. Were you in his place of business on Sunday, Jan. 10, 1897?

A. I was, in the forenoon.

Q. In the forenoon—not in the afternoon?

A. In the forenoon.

Q. Who was present there also?

A. All the ones that I recollect were Mr. Coffin and Mr. Booth.

Q. What Mr. Booth?

A. Mr. Booth, the juryman. Harry J. Booth, of Hyde Park.

Q. And he was in there on Sunday, January 10th?

A. He was.

Q. Did you at any time on that day say in the presence of Sylvanus B. Coffin, in his place of business, that you, Mr. Ford, said before the trial of the case that the defendant, Bram, ought to be hung?

Mr. FRENCH. Wait a moment, please. We renew our objection to the question.

212 COLT, J. He may answer.

Mr. FRENCH. We object and except.

A. I did not; positively I did not.

Q. Did you ever, in the presence of Mr. Coffin or to him, say that you had stated before the trial of the case of Thomas Bram that the defendant, Bram, ought to be hung, or anything like that?

A. Never.

Q. Did you ever state before the trial of the case that the defendant, Bram, ought to be hung?

A. Never.

Cross-examination:

Q. (By Mr. COTTER.) Do you know Frank Radford, of Hyde Park?

A. I do; yes, sir.

Q. Did you not state to Mr. Coffin that you had a talk with Frank Radford before the trial about this case?

A. I don't recollect that I ever did to Mr. Coffin.

Q. Are you sure you didn't?

A. I am not sure; I don't think I ever had a conversation, though, about that trial with Mr. Coffin.

Q. But did you not state that you had a conversation with Frank Radford before the trial?

A. I will say I don't recollect ever saying to Mr. Coffin anything about any such thing.

Q. Did you have a conversation with Mr. Radford about the Bram case before the trial began?

213 A. I don't recollect having a conversation with him, but one other of my shopmates.

Q. What is that?

A. Another one of my shopmates. Mr. Radford is a shopmate of mine.

Q. Mr. Radford is the superintendent, is he not?

A. No, sir.

Q. What is his connection with the shop where you work?

A. He is foreman of one of the jobs there in the shop.

Q. Who is the person you had the conversation with?

A. I couldn't tell you exactly who it was. It was one of my shopmates, but I don't know who it was. We were talking there together.

Q. How long was that before the trial?

A. Oh, it was several weeks before the trial. It was just after the indictment of Bram. It was probably the next day.

Q. Can't you give us his name?

A. I could not; no, sir.

Q. Tell us where he lives?

A. No, sir.

Q. Did you express any opinion to him?

A. I did.

Q. What was it?

A. Frank Radford might have been there at the same time. I couldn't tell you who were there.

Q. What was the opinion?

Mr. HOAR. I object.

214 COLT, J. As Judge Webb is inclined to the opinion that the evidence is admissible, it may go in, Mr. Cotter. The witness may take the stand.

Q. Do you remember the question, Mr. Ford? You were asked what the opinion was. You said you talked with somebody in the shop.

A. I can say what I said at that time?

Q. Yes.

A. When I heard—they were telling me and others there that they indicted Bram—and I said I thought they had got the right man now. That is the very words I said.

Q. And Frank Radford might have been present?

A. Yes; he might have been present; I couldn't tell you who was there. There was quite a number of us standing there talking.

Q. And did you express an opinion at any other time?

A. That is not very——

Q. Before you were called into the case, I mean?

A. At any other time?

Q. Yes.

A. Since I was called into the case?

Q. Before.

A. No, sir; I did not.

Q. Now, Mr. Ford, didn't you state to Mr. Coffin that you said to Frank Radford, before you were called into the case or empanelled as a juror, that Bram ought to be hung.

215 A. Never—positively so.

Q. But you think you did say they had the right man?

A. I didn't say it to Mr. Coffin.

Q. No, no; but to Mr. Radford.

A. I don't say I said it to Mr. Radford.

Q. But in his presence?

A. I don't say I said it in his presence. I can't recollect whether he was there or not.

Q. No. I understood you to say you thought he was there.

A. No, sir.

Q. Didn't you say you thought he was there?

A. I couldn't tell you. He might have been there.

Q. How many were present at that time?

A. I can't tell you that.

Q. And can you name anybody who was present?

A. No, sir; I cannot. I couldn't name who was there.

Q. And can you tell us the number of people who were present?

A. No, sir.

Q. Were they all shopmates of yours?

A. All shopmates; yes, sir.

Q. And what time in the day was that, Mr. Ford?

A. Oh, I should say it was in the afternoon some time.

Q. Can't you tell us something about the number of people who were present?

A. No, sir; I cannot.

216 WEBB, J. I think you have been over that sufficiently. He has already said that he cannot tell who was present and who was not.

Mr. COTTER. Very well, your honor. Did you know at that time that Frank Radford was one of the grand jurors?

A. I did.

Q. That sat in the Bram case?

A. I did.

Q. Does that at all refresh your recollection in regard to having any talk with him?

A. I don't think I ever had any talk with him about that.

Q. Do you remember one Matthew Cullen, who keeps a store on Hyde Park avenue?

A. I do.

Q. Did you not have a talk with him before you came onto the jury?

A. No, sir.

Q. Did you say in substance to anybody in Mr. Coffin's store that you said to Frank Radford, or anybody, before you were drawn on the jury, that you thought Bram ought to be hung?

A. Never; no, never.

Q. With whom did you have a conversation in Mr. Coffin's store on the 10th of this month?

A. I was talking with Harry Booth.

Q. How long were you there with him?

A. Oh, I was there perhaps five minutes.

217 Q. And did you talk about the case?

A. No, sir; I did not.
Q. Say anything about it?
A. We were talking—he said to me——
Q. Well, was there anything said about the case? That is all I asked you.
A. Nothing about the case at all; nothing about the case.

The district attorney then called OLIVER J. BRIGGS, the juror referred to in the affidavit of J. J. Connell.

Mr. COTTER. We object, if your honor please, on the grounds stated by Mr. French, which I do not think we need to repeat, but we wish to make the same objection and ask to have our rights reserved.

WEBB, J. The objection is to swearing the witness?

Mr. COTTER. No, if your honor please; to his testifying, on the grounds stated by Mr. French.

WEBB, J. You simply renew the objection to any testimony on the part of the Government?

COLT, J. Yes; the same objection that Mr. French stated.

Mr. COTTER. Yes.

Q. (By Mr. HOAR.) Mr. Briggs, your full name is Oliver?
A. Oliver J. Briggs.
Q. And you reside where?
A. In Cambridge.
Q. How long have you lived there?
218 A. Somewhere in the vicinity of 14 years.
Q. And what is your business?
A. Carpenter and builder.
Q. You were one of the jurors that sat in the Bram trial?
A. I was.
Q. Do you know James J. Connell?
A. I do.
Q. What is his business?
A. Well, he is a grocer, and I believe he is in the liquor business now on Cambridge street.
Q. Where is his place of business as a liquor dealer?
A. On Cambridge street. I couldn't tell you the number.
Q. Boston?
A. Boston.

[Here insert balance of page 34, and pages 35, 36, 37, 38, 39, 40, and 41, through "A. Harry J. Booth."]

Q. Did you on or about the fifth day of December say to James J. Connell, speaking of the defendant, Bram, substantially as follows: "There isn't the least doubt but things are looking bad for Bram, and I believe he is guilty?"
A. No, sir.
Q. Did you at any time say to James Connell substantially that?
A. Before or after the trial?
Q. Before the trial.
A. No, sir.
219 Q. Will you please describe the incident of the newspaper in the elevator?

A. Well, one night when we were going down in the elevator, I saw a paper lying on the little stool setting in the elevator, and I picked it up and put it in my pocket, and went down to the Quincy House and had supper, and after sitting there smoking a while I thought the thing over, and thought I had no right to look at it, and I got up and took it out of my pocket and gave it to Mr. McGonagle.

Q. Had you looked at it?

A. No, sir.

Q. Do you know the name of the paper?

A. I could not tell.

Cross-examination:

Q. (By Mr. COTTER.) Who was with you on the elevator when you picked up the paper?

A. The whole of the jury.

Q. One of the jurors?

A. The whole of them, I said.

Q. The whole of them? Were the officers with you?

A. They were.

Q. Mr. McGonagle and Mr. Ruhl?

A. Mr. McGonagle and Mr. Ruhl.

Q. Was there any objection made to your picking up the paper?

220 A. They didn't see me pick that paper up.

Q. What did you pick it up for?

A. It was lying there on the settee or on the chair, and I thought I would read it when I got down to the hotel.

Q. You knew at that time that it was improper for you to read a paper?

A. Just at that moment I didn't think of it.

Q. You put the paper in your pocket?

A. I did.

Q. Well, why did you pick it up and put it in your pocket without reading it, without letting the officer see you, if you thought it was all right?

A. I don't think I said that I thought it was all right.

Q. Well, then, you knew it was not all right, didn't you?

A. I said I didn't think at the time I picked it up.

Q. Well, you didn't think what, Mr. Briggs?

A. I didn't think that it was not proper for me to do it.

Q. How long did you keep that paper in your possession?

A. Till after we had supper.

Q. Meantime, did you go to your room?

A. No, sir; not out of the dining room.

Q. Not out of the dining room?

A. No, sir.

Q. You went from the court room. Did you go first to the dining room from the ——?

A. We did.

221 Q. Didn't you stop to make any change—to wash up, or anything of that kind?

A. No, sir.

WEBB, J. Where was this—at the Quincy House?

Mr. COTTER. At the Quincy House, your honor.

Q. Don't you recall, Mr. Briggs, that that was the Boston Journal?

A. I do not.

Q. Do you mean to say you didn't know?

A. I do not know.

Q. Never did?

A. Never did except from the remark of another man.

Q. Who was that man—one of the jurors?

A. Yes, sir.

Q. Did anyone call your attention to that paper, Mr. Briggs?

WEBB, J. Before he picked it up, do you mean?

Mr. COTTER. Yes, your honor.

A. Well, I saw it when I first went in the elevator, and I am quite certain one of the jurors said, "Put it in your pocket," and I did so.

Q. One of the jurors said so?

A. Yes, sir.

Q. You said you knew the paper only from some remark. Was that remark made by the juror?

A. Yes, sir.

222 Q. Did he state what the paper was?

A. He did; but I couldn't remember just what paper he said, whether it was the Advertiser or the Journal.

Q. One or the other?

A. I should say that it was one or the other; I wouldn't say exactly.

Q. Well, he stated at the time, but now you don't remember which one he said, if I understand your testimony?

A. I don't remember whether he said the Advertiser or the Journal.

Q. But he said one of them?

A. One of them; I should say he said one of them.

Q. Now, in regard to Mr. Connell. Where is his grocery store?

A. It used to be on Charles River street, but I believe the name of the street is changed—Cambridge.

Q. Charles River street?

A. Cambridge.

Q. Is that the name of the street, Charles River street?

A. I say it is changed. I don't remember what the name is now; it used to be that.

Q. The reporter asked me if you said Charles River street.

A. Yes, sir.

Q. You have known Mr. Connell for a long time, have you not?

A. A number of years.

Q. And visited his place of business?

A. I have.

223 Q. Frequently?

A. Well, not very.

Q. And did you visit there during the month of December before you were drawn on this panel—I mean in the United States *vs.* Bram?

A. I may have been in there; I can't say for sure.

Q. You might have been there about the 5th of December, might you not?

A. I wouldn't say I was not.

Q. And when you went there, did you go alone or in company with other people?
A. I generally went in company with some one else.
Q. And you frequently remained some time, did you not?
A. Not very long.
Q. Talked over matters?
A. It depends upon what matters.
Q. What say?
A. It depends on what matters you have reference to.
Q. Did you talk about any matters?
A. Nothing particular.
Q. You engaged in conversation with him, didn't you?
A. Well, yes; the people that were in there—we did all together.
Q. Your friends assembled there some?
A. Yes, sir.
Q. Which store did you visit—the one in Cambridge or the one in Boston?
224 A. The one in Boston. I have visited the one in Cambridge but not of late.
Q. Now, you had occasion to speak of your jury service, did you not, and your jury duty, when you were serving here in the circuit court, before you were called into the Bram case?
A. I think not.
Q. How positive are you, Mr. Briggs?
A. I am positive I didn't.
Q. That you did not?
A. I am positive that I didn't say any words to the effect that is set forth here.
A. No; not set forth here, but you talked about jury service and your work in court here, didn't you?
A. I said I didn't expect to be on the jury, because there was a special jury for that.
Q. You had some talk about the Bram case with Mr. Connell?
A. No, sir.
Q. Not any?
A. Not to my knowledge.
Q. Well, you said you didn't expect to be on the jury, as I understood you to say?
A. I said I understood there was to be a special jury for that.
Q. Yes; a special jury.
A. I thought so, because I was told so when I was here.
Q. And did that conversation occur while you were serving on the other jury?
225 A. I couldn't say whether it did or not.
Q. And was that about the 5th of December?
A. I couldn't say that.
Q. Mr. Connell lives at Cambridge?
A. I believe so.
Q. Do you remember meeting him on the street car some evening?
A. I have several evenings.
Q. Do you remember talking with him on the street car?

A. Well, we always pass the time of day and talk when we meet.

Q. Do you remember doing so early in December or about that time?

A. I can't say that I remember any particular time.

Q. And do you remember speaking about of your service on the jury with him when on the street car?

A. Not to my knowledge. No.

Q. You might have, might you not; you might have talked with him on the street car in regard to jury duty?

A. I might have just made a remark, but not as conversation.

Q. Well, you can't recall here when you said to Mr. Connell in regard to the Bram case, can you, in all of its details?

A. I can't recall that I ever said anything to him.

Q. Well, let us see. I understood you to say that you told him that you didn't think you would serve on the Bram case because they had a special jury.

226 A. That was all there—there was a special jury for it.

Q. Didn't you say something further than that, Mr. Briggs?

A. Not to my knowledge, sir.

Q. You might have, might you not?

A. I don't think it.

Re-direct examination:

Q. (By Mr. HOAR.) Mr. Briggs, you have said that a juror pointed out that—spoke of that paper in the elevator. What was his name?

A. Harry J. Booth.

The district attorney also called the attention of the court to the examination of the juror Abel C. Ford on his voir dire, which was as follows:

Q. (By the CLERK.) Are you related to the prisoner at the bar or to the deceased, Captain Charles I. Nash?

A. I am not.

Q. Have you any interest in this case?

A. I have not.

Q. Have you formed or expressed any opinion in relation to it?

A. I have.

Q. Are you sensible of any prejudice or bias in relation to it?

A. No, sir.

227 Q. Have you any opinion which precludes you from finding a person guilty of an offence punishable with death?

A. No, sir.

Q. (By Mr. HOAR.) You say you have formed an opinion. Is it an opinion so fixed that it could not be moved, by evidence that you heard, at all?

A. No, sir; not at all.

Q. (By Mr. COTTER.) On what was your opinion formed, Mr. Ford?

A. It was formed on reading the case.

Q. On newspaper report?

A. Yes, sir.

Q. What paper did you read?

A. The Herald.

Q. Any other?
A. That is all.
Q. How fully did you read the newspapers?
A. Partial reports.
Q. And at what period?
A. I read the first part of the case and the last part?
Q. Did you discuss the case with anyone?
A. No, sir.
Q. Have you formed any other opinion except such as you formed from the reading of the newspapers?
A. That is all.

228 Q. Is the impression made on your mind such, from the newspaper report, that you can not set aside the newspaper impressions and reports and give due weight—proper weight—to evidence?
A. No, sir.
Q. You think you can give proper weight to the evidence?
A. Yes, sir.
Q. And when you hear the evidence, decide the case on the evidence?
A. Yes, sir.

In rebuttal, the defendant called the affiant, SYLVANUS B. COFFIN:
Q. (By COLT, J.) Your full name?
A. Sylvanus B. Coffin.
Q. (By Mr. COTTER.) And you reside in Hyde Park?
A. Yes, sir.
Q. And you are in business there?
A. Yes, sir.
Q. In what business?
A. Confectionery and newspapers.
Q. Confectionery and newspapers?
A. And cigars.
Q. Do you remember seeing Mr. Ford there on Sunday, the 10th of this month?
A. Yes, sir.
Q. And at what time in the day was Mr. Ford in the store?
A. I am not quite positive; I think it was between 12 and one o'clock.

229 Q. And with whom did he engage in conversation?
A. Mr. Booth.
Q. Now, was this Bram case spoken of at that time?
Mr. HOAR. I object.
COLT, J. We hardly think that is admissible.
Mr. COTTER. Very well, your honor. We will ask that the point be saved, your honor.
COLT, J. That question is excluded, on the ground that it is not proper in rebuttal.
WEBB, J. Merely cumulative of your case in chief.
At the trial of said case on December 21, 1896, the court said:
COLT, J. As the court understand that one of the jurymen is suffering from a sick headache, and as the counsel desire to present certain questions to the court not proper for them to present in the presence of

the jury, the jury will now retire for the night and be returned at half past nine to-morrow morning.

WEBB, J. Mr. Officer, you will see that any proper medical attendance that may be needed is supplied the jury.

The foregoing was all the evidence material to the issue raised by the motion.

At the close of the hearing the defendant requested rulings, copies of which are as follows:

230 *Defendant's requests for findings.*

1. There is no sufficient evidence in the case to establish the fact that the communication described in Booth's affidavit was harmless.

2. A communication of that character is absolutely forbidden and is sufficient to invalidate the verdict.

3. The conduct of the bailiffs and other officers in charge of the jury, as described by the evidence in the hearing on motion, is such an irregular invasion of the right of a trial by jury as to absolutely vitiate the verdict.

4. The officers had no right to intermeddle with and take meals with the jury after the case had been fully submitted to the jury and before the return of the verdict.

5. It was improper and irregular for the officers in charge of the jury to permit other persons to visit or converse with the jury as described in the evidence taken at the hearing on the motion for a new trial.

6. It is vital in capital cases that the jury should pass upon and determine the case free from external causes.

7. Upon all the evidence introduced at the hearing, it is the duty of the court to set aside the verdict of the jury and to order a new trial.

231 *Defendant's additional request for findings. Re motion for new trial.*

The defendant further asks the court to find:

That the communication found in Booth's hat was possibly prejudicial and invalidates the verdict. It cannot be said that its harmlessness was apparent. The burden is upon the Government to show affirmatively that it was harmless.

Mattox *v.* U. S., 146 U. S., ad. p. 150.

Motion for a new trial was denied by the court, the court making the following rulings:

This motion sets out various reasons in its support. They will be disposed of separately, but not in the order in which they are expressed in the motion.

Before considering the specific grounds on which a new trial is asked, the court feels constrained to say a word as to the statements of counsel regarding popular feeling and expectation that a certain decision shall be pronounced in this case. We have been warned of the effect upon the respect for courts and their administration of the law if outside judgments or expectations are not satisfied. Such influences have no proper place in a court of justice. Nothing could so surely destroy confidence in judicial proceedings and decisions as a general conviction that judges

were governed and controlled by outside demands, under the stress of popular excitement, either of animosity or of sympathy, instead of
232 by a dispassionate examination of the law and the evidence. It is to be regretted that in the present case such matters have been urged upon our attention. But in a case of this kind much will be pardoned to the natural sympathy of counsel for their client and to the effect produced upon their feelings by everything in encouragement of their hopes.

Without further comment on this subject we proceed to the grounds for the motion.

First of all is the contention that some of the jurors were not qualified to sit in the cause, or, to state it differently, that some of them before being empanelled had formed and had expressed opinions in regard to the guilt or innocence of the defendant, and that one at least cherished and had expressed violent prejudice against the defendant. This charge, if supported, would require the verdict to be set aside. An impartial jury is indispensable in every trial, and especially in one involving such serious consequence as this. When a question of the proper qualification of jurors is raised, the first duty of the court is to determine it, and if it is found that the objection is sustained, a properly qualified jury should be substituted, by a new trial, if the defect has not been discovered in season to purify the panel before the commencement of the trial, by setting aside the individual and calling an impartial man in his place. In this case every juror was examined on his voir dire before being sworn to try the indictment, and counsel for the defence as well as for the prosecu-
233 tion had the privilege of further examination. In the judgment of the court at that stage of proceeding every juror sworn in the cause was properly qualified, and no challenge, either peremptory or for cause, being interposed, he was placed upon the panel. The trial occupied the court and jury continuously from December 14, 1896, to January 2, 1897, with the exception of Sundays and Christmas Day, and the jury were kept together during the whole time. It was only after the verdict had been recorded that anything was heard of the present objection.

In support of this objection evidence, both oral and by affidavit, has been produced, and, on the other hand, the jurors alleged to have been disqualified have appeared and testified before the court and have denied the accusations against them. We do not think the evidence proves any prejudgment on the part of either of the jurors accused. Without going into any recital and comparison of the evidence on one side and the other, it is enough to say that we find in it nothing to impeach the integrity of either of the jurors or to disqualify either for the duty of sitting in this cause. A motion for a new trial is addressed to the discretion of the court, and its decision is conclusive upon the question whether one of the jurors had, in fact, formed or expressed such an opinion as should disqualify him to try the case. Woodward v. Leavitt, 107 Mass., 453, 460; Clyde Mattox v. United States, 146 U. S., 140, 147, 149.

The next objection to be examined is alleged misconduct of the jury in the jury room while the trial was in progress, both before and
234 after the case had been finally committed to them. To support this objection, affidavits of one or more of the jurors have been

presented, and the foreman has been permitted to testify to some things which took place in the jury room during the final deliberation on the case.

We should not omit to say that upon this point that no evidence from others than members of the jury has been offered.

The general rule is that jurors can not be permitted to impeach the verdict to which they have assented and in which they have concurred.

In Woodward v. Leavitt, ubi supra, Judge Gray, speaking for the court (p. 460), said:

"The proper evidence of the decision of the jury is the verdict returned by them upon oath and affirmed in open court. It is essential to the freedom and independence of their deliberations that their discussions in the jury room should be kept secret and inviolable; and to admit the testimony of jurors to what took place there would create distrust, embarrassment, and uncertainty."

See also Chadbourn v. Franklin, 5 Gray, 312, 315.

But this rule does not apply to extraneous influences or acts.

The Supreme Court, in Clyde Mattox v. United States, ubi supra, said, at page 149:

"The subject was much considered by Mr. Justice Gray, then a member of the supreme judicial court of Massachusetts, in Woodward v. Leavitt, 107 Mass., 453, where numerous authorities were referred to and applied, and the conclusions announced 'that on a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such
235 acts has been given as ground for a new trial.' See also Ritchie v. Holbrook, 7 S. & R., 458; Chews v. Driver, 1 Coxe (N. J.), 166; Nelms v. Mississippi, 13 Sm. & Marsh, 500; Hawkins v. New Orleans Printing Co., 29 La. Ann., 134, 140; Whitney v. Whitman, 5 Mass., 405; Hix v. Drury, 5 Pick., 296.

"We regard the rule thus laid down as conformable to right reason and sustained by the weight of authority."

Tested by these principles, we do not think the testimony admissible as to any comments one of the jurors may have made during the progress of the trial to one or more of his fellow-jurors with respect to Bram's testimony, or as to the so-called experiment of the jury in the jury room during their secret deliberation upon the verdict.

But, even if admissible, we do not think the evidence shows any irregularity on the part of the jury, though it would have been more proper for the juror to have abstained from any comments on the testimony until the case was finally submitted.

But it is further urged that the jury received improper communications from outside and were subjected to improper interference, and this, we think, should receive careful consideration.

It is said that an improper communication was secretly made on the fourth or fifth day of the trial by a Mr. Harrington, one of the bailiffs

in attendance upon the jury, to one of its members. It is well proved by the affidavit of Mr. Harry J. Booth, a juror, that the bailiff so far betrayed his trust as to approach him, Booth, and whisper to him, "Look in your hat;" that the juror so prompted did look and found slipped under the sweat band of his hat a scrap of paper on which was
236 written, "Would you like a ½ pint? If so, give me the tip Sat. morning. I will put it in your pocket. Red."

Mr. Booth testifies that he was embarrassed to know why this communication was made to him, and that he at once made it known to the foreman and to another bailiff also in charge of the jury. This action on the part of Bailiff Harrington merits the severe condemnation of the court. It was a gross violation of duty, for which there can be no excuse nor palliation. But the question is, what effect should it have to vitiate the verdict finally rendered by the jury and recorded by the court?

It is not denied that improper interference with a jury by a party, or anyone acting in his interest, or on his behalf, will vitiate a verdict. (Woodward v. Leavitt, 107 Mass., 453, 466.) In the present instance the bailiff was acting voluntarily. He in no way represented or pretended to represent the prosecution. The paper found in Booth's hat made no suggestion in regard to the case; the only condition of his proposed putting of anything in the juror's pocket, was that the juror should give a signal that he would like it.

Manifestly it only indicated a willingness on Harrington's part to supply something—presumably spirituous liquor of some kind—
237 if the juror would indicate a request for it. Furthermore, the juror did not act upon the hint, but at once exposed the bailiff. Nothing was conveyed to the juror, and we can not see how the transaction could have exercised any influence, favorable or prejudicial, on the jury, or such of them as had knowledge of the affair. The argument that because Booth in his affidavit says he was embarrassed, he was therefore embarrassed in the free action of his faculties in listening to the evidence and arguments, and in his final deliberation before reaching a verdict, appears to the court utterly insubstantial. For an irregularity like this, to set aside the verdict, would be a failure of duty on the part of the court.

We next have to consider the incident of the newspaper found in the elevator by one of the jurors, as he and his associates were passing from the court-house to their boarding place. The evidence is that he did not even notice the name of the paper, but was told it by one of his fellows who saw it as he picked it up and put it in his pocket; that he never opened or looked into it, nor passed it to any other juryman; that though sorely tempted to read, he reflected that to do so would be wrong, and he thereupon delivered it to the officer in charge of the jury, and that was the end of the whole thing. We are hardly willing to believe that counsel, after the excitement of the case has subsided, would seriously contend that for this reason this court would be justified in disturbing the verdict of the jury.

At the outset of this case it was apparent that the trial would
238 necessarily be protracted; some provision for the sustenance of the jury and for their lodging while kept together and forbidden to separate was imperative, and the marshal was directed to make provi-

sion accordingly. He was also ordered to provide whatever was necessary for the comfort and health of the jurors, including necessary medical attendance. Before the trial was concluded, one night one of the panel was so sick that he needed the treatment of a doctor; one was sent for, and was admitted to the presence of the jurors, where they were quartered, and prescribed for the sick man, and gave him directions how to care for his health. The foreman, with commendable prudence, watched the whole proceeding and words of the physician, and has testified that nothing took place other than as stated above. The due and orderly conduct of a trial does not require that a juryman shall be deprived of such medical treatment as may be requisite for his comfort, his health, and perhaps the preservation of his life. While the physician strictly confines himself to his professional duty, and in no way touches upon the duty of the jury or the business about which they are engaged, it is no error to allow him to render his professional aid, and a verdict rendered by a jury, one of whose number has been so unfortunate as to need the ministration of a doctor will not therefore be disturbed.

But it is further urged that when the jurors at a few times were taking their meals brought to the jury room for them, the bailiffs in charge, not including the Bailiff Harrington, by the way, also ate their meals
239 in the same room. The bailiffs testify that while so eating they held no conversation with any of the jurors, and there is no evidence to the contrary. There were also present waiters or servants who brought the food, and attended upon those who partook of it, passing what was called for, pouring coffee, etc. There is not the slightest suggestion of any evidence that these servants waiting on table, or either of the bailiffs there partaking of the food provided, had any talk with the jury. It would without doubt have been better, at whatever inconvenience, to provide meals for the bailiffs apart from the jurors. But these bailiffs had taken the following

"*Oath to officer.*

"You swear that you will keep this jury in some convenient place until the time to which this court shall be adjourned, and during each and every adjournment of this court pending this case, and that you will not suffer any person to speak to them, nor speak to them yourself, unless by order of court, or to ask them if they are agreed, and that you will not suffer them to disperse until you shall return them into court again, so help you God."

To comply with the obligation of this oath compelled the officers either to be constantly near the jury or to confine them in some inaccessible place. Until something more tangible than suggested suspicion of possible violation of their duty and their oaths is produced to the court, we shall not put upon the sworn officers of the court the severe censure of setting aside a verdict, on a possible conjecture that they have been guilty of conduct which would render them subject to severe punishment.

None of the above objections to the acts of bailiffs and the pres-
240 ence of servants requires or justifies setting aside this verdict.

The tone, language, manner, and unjustifiable inferences from the testimony of the final argument of the district attorney are urged as a further ground in support of the motion.

As to tone of voice, personal zeal, emphasis, and earnestness of counsel, they depend on personal traits and temperament, over which the court has no control. As to alleged unwarranted expressions, arguments, or improper deductions from the testimony employed by the district attorney, it was the duty of the counsel for the defendant to at once call the attention of the court to what was objectionable, and have it stopped. This was done only in one instance, and the objectionable argument was discontinued. But waiving the question of objection, we do not find that the district attorney used any such unwarranted expressions as would justify the court in setting aside this verdict.

Moreover the jury was carefully instructed in terms, to which no exception was taken, regarding the proper weight they should allow to arguments of counsel.

(Learned v. Hall, 133 Mass., 417; Commonwealth v. Poisson, 157 Mass., 510; Hall v. United States, 150 U. S., 76; Graves v. United States, id., 118.)

The alleged prejudice of the defendant's rights, by questions, expressions, and interruptions by one of the judges engaged in the trial, next invites attention.

This objection to the verdict is pressed with much earnestness and apparent sincerity. In every instance that the defendant's attor-
241 ney expressed to the court his dissatisfaction, the expression, or the question objected to, was withdrawn. Upon the hearing of this motion, it has been assumed that such withdrawal was prompted by a consciousness of some error, an assumption which is unwarranted. In some instances no objection to the question or the action of the court was made. If in pressing this motion it is contended that an expression of hostility to, or at least prejudice against, the defendant was manifested, a more careful examination of the record will, we believe, disabuse the minds of the counsel on this point. The questions to the medical experts which are specified were suggested by the position taken by the defence and grew out of it. The examination of his experts by the district attorney did not cover the whole ground taken by the defence, and the questions by a member of the court only supplied that omission. The remark which was addressed to counsel about the loose sheets of paper which the defendant called a duplicate of the log book, but which the evidence showed was not a duplicate, but something else, was not a misstatement of fact, but grew out of the contention of counsel as to whether the witness should be permitted to refresh his recollection as to the course the vessel was sailing, not only from the log book which was handed to him, but from memoranda subsequently made by him, which were not copies of the log book. Upon objection by defendant's counsel the court at once directed that every remark made be stricken out.

The questions which were asked during the cross-examination
242 of Sprague, an expert witness called by defendant, about the helm were proper. Only the last of these questions was objected to, when it was withdrawn and the district attorney was forbidden to repeat it.

There was an interruption by the district attorney of the argument of counsel for the defendant, where he was commenting on the examination of the witness Brown before the grand jury and the nonexamination of Bram. The argument was that there had been some "mysterious arrangement" for this proceeding on the part of the district attorney.

The court, or one member of it, remarked that the argument was "farfetched," but the argument was allowed to proceed. Strictly, the argument imputing as it did some "arrangement" on the part of the prosecution was not only farfetched, but unjustifiable. It accused the Government attorney of impropriety and abuse of his official position. The fact of calling Brown and not calling Bram before the grand jury was open to discussion and criticism in so far as it evidenced an unfavorable discrimination and prejudgment against the defendant. It did not warrant the impeachment of the officers of the United States of the wrong of contriving or combining or colluding with anyone or in any way to injure the defendant. But waiving all discussion of the reason for the expression of the judge in this and other instances, these objections proceed upon the unsound theory that a judge has no duty in the trial of causes except to keep order and hold counsel within the rules and the law. This theory would require a judge to stand by and
243 silently permit carelessness, forgetfulness, oversight, or inexperience, or superior tact, or astuteness to defeat justice and right.

It has been repeatedly held by the Supreme Court of the United States that in the national courts the judge may express to the jury his opinion in regard to the issue, provided he properly instructs them that the whole matter is one for their own determination. If he may so express an opinion upon the issue, he may manifest his opinion regarding any particular upon which the determination of the issue may in some degree depend, always on the same condition of instructing the jury of their rights and leaving to their independent action the determination of the matter. It can not be denied that in this case the jury were carefully and plainly instructed that they were not to be governed or influenced by any implied or expressed opinion of the court, but were bound to examine, weigh, and determine every point for themselves according to the free and independent and conscientious exercise of their own intelligent judgment.

In Simmons v. United States (142 U. S., 148), Mr. Justice Gray, speaking for the court, declared—

"And it is so well settled by a long series of decisions of this court that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination that it is only necessary to refer to two or three recent cases in which the judge's opinion on matters of fact was quite as plainly and strongly expressed to the jury as in the case at bar. (Vicksburg, &c., Railroad v. Putnam, 118 U. S., 545; United States v. Philadelphia & Reading Railroad, 123 U. S., 113; Lovejoy v. United States, 128 U. S., 171.)"
244 See, also, B. & P. Railroad v. Fifth Baptist Church, 137 U. S., 568, 574; Doyle v. Union Pacific Railway Company, 147 U. S., 413, 430; Wilborg v. United States, 163 U. S., 632.

There remains for consideration only the general argument that the verdict is against the evidence and the weight thereof.

The authorities are very numerous which define the proper action of courts in reversing verdicts of juries as against evidence. The principle expounded by them may be summarily stated to be that when there is

evidence in the case which, if believed by the jury, would warrant their verdict it must stand, notwithstanding the fact that the court might have decided differently. There was such evidence in the present case, and in the light of the great preponderance of authority on this point the court cannot disturb the verdict given by a jury who showed themselves conspicuously patient and attentive during a long and wearisome trial. Moreover, in justice to the jurors compelled to engage in a most unpleasant and responsible duty, we are impelled to say that we do not see how any intelligent, conscientious, and painstaking jury, having listened to the whole trial and having seen the various witnesses, could have reached any different verdict.

245 We have given careful consideration to all the arguments of defendant's counsel and to the authorities cited in support of this motion.

In a protracted trial in a capital case, extending over a period of three weeks, it would probably be impossible not to discover some slight irregularity, but we do not find in this case, upon the well-settled principles governing motions of this character, any such irregularity as would justify the court in granting a new trial.

The motion for a new trial is denied.

Thereupon the defendant addressed the court as follows:

Mr. French. If your honors please, we are not aware how far we have rights to reserve exceptions to the findings of your honors with reference to this motion, but we desire to save, of course, all the right that the defendant has.

We except, if we may be permitted to, to the refusal of the court to find specifically in accordance with the requests submitted by counsel for the defendant at the close of the hearing upon the motion.

We except also, if we have a right to except, to the suggestion in the opinion to the effect that comment made by one of the jurors during the trial was not admissible—

To the finding of fact that the jurors called denied the evidence of bias—

To the findings of fact and conclusions of law as to the paper put in the juror Booth's hat by the bailiff—

246 To the finding that something more than a suspicion of wrongdoing on the part of a bailiff or stranger is necessary to set aside a verdict—

To the finding that the language of the district attorney was not improper—

To the finding that the withdrawal of the question and comment cured the objection, if any, which existed thereto—

To the finding with regard to the interruption of and comment by the court upon the final argument of the defendant's counsel.

No exceptions were formally allowed, but the matter was to be certified.

Before the foregoing motion had thus been disposed of and before judgment on the verdict the defendant filed the following motion for a new trial on the ground of newly discovered evidence, supported by affidavits, copies of which are given. At the hearing of this motion the Government introduced no evidence, but referred to evidence at the trial.

Defendant's motion for new trial on ground of newly discovered evidence.

And now comes Thomas M. Bram, the defendant in the above-entitled cause, and moves the court to set aside the verdict therein and to order a new trial, on the ground that certain new evidence has been discovered since the rendering of said verdict material to the issue involved in said indictment, the character of which evidence will more fully appear from the affidavits of Jonathan Spencer, Wallace Downey, and Hugh G. Messenger, filed herewith, and reference to which is hereby made.

By his counsel.

(Signed)

JAMES E. COTTER.
ASA P. FRENCH.

We hereby certify that the information contained in the affidavits above referred to, upon which the foregoing motion is based, was not obtained by us, and could not of necessity have been obtained by us, by the exercise of due diligence until after the rendering of the verdict in said cause.

(Signed)

JAMES E. COTTER,
ASA P. FRENCH.

After the rendering of the verdict and before judgment the said "Herbert Fuller" arrived in port at New York from South America. Thereupon the defendant had certain experiments made on said vessel in said New York, as set forth in the affidavits of Jonathan Spencer, Hugh G. Messenger, and Wallace Downey, copies of which are as follows:

248 [Caption omitted.]

Affidavit of Jonathan Spencer.

I, Jonathan Spencer, of Brooklyn, in the county of Kings and State of New York, of lawful age, on oath depose and say: That I am the Jonathan Spencer who recently testified in case of United States (Government witness) against Bram in the circuit court of the United States for the district of Massachusetts; that at the noon hour to-day I met District Attorney Hoar and Mr. James E. Cotter on board of the barkentine "Herbert Fuller," lying at the Empire Stores, so called, in said city of Brooklyn. In addition to counsel, Mr. Messenger, of Boston, Mass., certain of the present officers of the "Herbert Fuller," and other persons were present. At the request of counsel, and in the presence of all parties, I arranged and placed a bunk, which was in the after cabin or chart room, so as to correspond and be in the same position as was the cot on which Captain Nash slept on the night he was killed. At the request of counsel I hung the lantern in the forward cabin from the same hook on which it hung the night of the murder. Mr. Messenger stood at the wheel and worked the wheel with both hands in my presence and made observations through the window of the after cabin. The curtain was pushed back so as to represent its condition on the night of the murder.

My observations from the wheel into the after cabin where with the same result as testified by me in this case at the trial in Boston last December.

The counsel requested that additional observations be made after
249 dark, in the nighttime. Pursuant to an agreement reached between them, I visited the boat again at 8:30 o'clock this p. m. I met counsel, Mr. Messenger, and Mr. Wallace Downey, of Brooklyn, at the wharf, and all of us went on board of the "Herbert Fuller" together. The lights were turned out, excepting a lantern in the cabin, and I was requested to put things in the condition they were on the night of the murder, and I did so accordingly. I saw that the light in the lantern which I had hung in front of the clock in the forward cabin, where I placed it on the night of the murder, was turned down as it was on that night. I arranged the cot and other things in the after cabin so as to conform as nearly as possible to their position on the night of the murder. Mr. Messenger was requested to lie upon the floor near the cot, to represent the position of which I found Captain Nash after his death, and a white blanket was placed over him. His position, in fact, upon the floor was about the same as that occupied by Captain Nash when I first saw his remains. I then went to the wheel and stood erect on the starboard side thereof with both hands upon it and tried to look into the after cabin through the window. From that position I found it impossible to see any object whatever in the after cabin. During my observations, and in fact during the observation of the other gentlemen, a light was burning in the bin'acle as it was on the night of the murder. With one hand on the wheel and bent over, with my face close to the steps, I could see the form of a person in the after cabin, but could not be able to distinguish or identify him, on account of the rays of light being so dim. By
250 holding on the wheel with one hand and reaching over and bending with my face close to the steps I could see the lower end of the cot and Mr. Messenger's feet and his legs part way to the knees. When Mr. Messenger came to the wheel this evening, I laid on the floor near the cot where I found Captain Nash's remains, and a light-colored blanket placed over me, and I laid in that position as long as the parties desired me to. Mr. Wallace Downey was at or about the wheel during the examination on this evening. I saw him stand at the starboard side of the wheel and make observations from there.

(Signed) JONATHAN SPENCER.

The above was duly sworn to on 6th February, 1897.

[Caption omitted.]

Affidavit of Hugh G. Messenger.

I, Hugh G. Messenger, of Boston, in the Commonwealth of Massachusetts, of lawful age, on oath depose and say: That I am the Hugh G. Messenger who recently testified in the case of United States against Bram in the circuit court of the United States for the district of Massachusetts; that by request of the counsel for the defendant in said case I came to New York last evening, and pursuant to an understanding reached in my presence between United States Attorney Hoar and Mr. James E. Cotter I visited the "Herbert Fuller" at the Empire Stores, so called, in

Brooklyn, at the noon hour to-day, February 6th, when Mr. Hoar,
Mr. Cotter, Jonathan Spencer, and several other gentlemen were
251 present. I found the vessel in substantially *in* the condition as
described by me when I testified as witness in said case. In the presence of all the aforesaid parties Mr. Spencer located and placed in position a cot in the after cabin or chart room as indicating the position of the cot *of* which Captain Nash slept when he was killed. I then took my position at the wheel and made observations, with the same results as stated in the stenographic report of my evidence given at the trial as aforesaid. The steward, Mr. Spencer, made observations from the wheel in the presence of the aforesaid gentlemen. It was then agreed between the counsel present that further observations will be made in reference to the after cabin or chart room, more particularly from the wheel, for the purpose of determining how distinctly the cot, the man on the floor near the cot occupying the position in which Captain Nash's remains were found the morning after the murder, as represented and pointed out by Mr. Spencer in the presence of the aforesaid parties, at the hour of eight-thirty this p. m. After dark I accompanied Mr. Hoar and Mr. Cotter on board of the said "Herbert Fuller." We were there joined at the wharf by Mr. Spencer and Wallace Downey, of Brooklyn. All the lights in the cabin were put out with the exception of a light in a lantern, which was hung in the forward cabin from the hook in the front of the clock to represent the position of the lantern and the condition of the light on the night of the murder. I then laid on the floor near the cot and a white blanket was placed over me in the position where it was said
by Mr. Spencer that Captain Nash's remains were found after
252 his murder. While I was in this position Mr. Spencer, Mr.
Downey, and counsel were at or about the wheel. I was then ordered to come to the wheel, and Mr. Spencer took the position which had been occupied by me on the floor and the aforesaid blanket was placed over him. I then stood at the wheel, on the starboard side of said wheel, with both hands upon it, standing erect, and tried to look into the after cabin, and I found it utterly impossible to see any object in that cabin. I could not see any part of the bunk or the man on the floor of the after cabin, to wit, Mr. Spencer, or the covering over him. The light into the after cabin was very dim; indeed, I could hardly discern it—the light. With one hand on the wheel, and by reaching over so that my face came quite close to the window, I could then barely see Mr. Spencer's feet and the foot of the cot, and the light was so dim in the after cabin that it was with the greatest difficulty that I was able to discern these objects. The light was so dim that it was impossible to distinguish by me or recognize a person. I could merely observe a form with my face close to the window, and I bent over. I have carefully read the evidence of Charles Brown, on pages 723 and 724 of the stenographic report of the United States against Bram, taken December 18th, 1896. From the position therein described by Mr. Brown at the wheel it is utterly impossible for anybody to see into the after cabin.

(Signed) HUGH G. MESSENGER.

The above was duly sworn to on 6th day of February, 1897.

Affidavit of Wallace Downey.

I, Wallace Downey, of Brooklyn, N. Y., county of Kings, of lawful age, on oath depose and say that I am Wallace Downey, shipwright, of Brooklyn, N. Y. I was to-day introduced to James E. Cotter, of Boston, Mass., by Mr. F. W. Houghton, superintendent of the Maritime Association of the port of New York. Mr. Cotter thereupon requested me to meet him and U. S. District Attorney Hoar on board of the barkentine "Herbert Fuller," lying at Empire Stores in Brooklyn, at 8.30 this p. m. I met them there at the appointed time and was there introduced to Jonathan Spencer and Hugh G. Messenger; in addition to the persons named certain officials connected with the "Herbert Fuller" were on board of the vessel. I was present at the taking of the depositions of said Spencer and Messenger, and so far as their depositions relate to what occurred on their visit to the "Herbert Fuller" at 8.30 o'clock this p. m., I was present and witnessed the experiments described by both of them, and experiments were made as stated by them. I took position on the starboard side of the wheel with both hands upon it, and standing erect while working the wheel it was impossible for me to observe anything whatever in the interior of the after cabin, looking through the window in the after part of the house; by removing one hand from the wheel and leaning over toward the window with my face near the steps I could see very faintly about a foot and a half of the lower end of the cot and the feet
254 and legs of the person laying near the cot part way up to the knees. Light was so dim in the interior of the cabin that when leaving the wheel altogether and putting my face as near as possible to the window, I could see the form of a person moving inside the cabin, but not distinctly enough for recognition. While we were making certain observations the counsel and the gentlemen connected with the vessel were in the cabin. I carefully read the testimony of Charles Brown, on pages 723 and 724 of stenographic report in case of United States against Bram, given December 18th, 1896. With the same amount of light that was in the cabin to-night, as arranged by Mr. Spencer, it would be impossible for a man standing in the position described in Brown's evidence, on the pages 723 and 724, to distinguish any objects in the interior of the cabin. District Attorney Hoar called attention to the fact that I wore glasses when making observations. "I have been accustomed to wearing glasses for years. I see much more distinctly with the aid of glasses than without them. With glasses my eyesight is very good. I am 35 years of age. This affidavit in the main I personally dictated. The transcript of Brown's evidence was shown to me by Mr. Cotter, as given in the United States circuit court in Boston.

(Signed) WALLACE DOWNEY.

The above was duly sworn to on 6th day of February, 1897.

255 In addition to the aforesaid three affidavits, the defendant filed in support of said motion, affidavits of James E. Cotter and Asa

P. French, his counsel, and his own affidavit, copies of which are as follows:

[Caption omitted.]

Affidavit of James E. Cotter in support of motion for new trial on ground of newly discovered evidence.

I, James E. Cotter, of Hyde Park, in said district, of lawful age, on oath depose and say that I am of counsel of record for the defendant in the above-entitled cause; that during the trial of said cause and after the rendering of the verdict therein, I did not know and had no reason to believe that the "Herbert Fuller," the vessel named in said indictment, was in any port of the United States until I was informed on the second day of February, 1897, by a letter from the United States attorney for said district that the said "Herbert Fuller" had arrived and was then in the port of New York. Prior to the receipt of that letter I was informed and believed that said vessel was in South America.

(Signed) JAMES E. COTTER.

This was duly sworn to on the 10th February, 1897.

256 [Caption omitted.]

Affidavit of Asa P. French in support of motion for new trial on ground of newly discovered evidence.

I, Asa P. French, of Randolph, in said district, of lawful age, on oath depose and say that I am of counsel of record for the defendant in the above-entitled cause; that during the trial of said cause, and after the rendering of the verdict therein, I did not know and had no reason to believe that the "Herbert Fuller," the vessel named in said indictment, was in any port of the United States until I was informed on the —— day of February, 1897, by a letter from the United States attorney for said district that the said "Herbert Fuller" had arrived and was then in the port of New York.

ASA P. FRENCH.

The above was duly sworn to on the tenth day of February, A. D. 1897.

257 [Caption omitted.]

Affidavit of defendant in support of motion for new trial on ground of newly discovered evidence.

I, Thomas M. Bram, of lawful age, on oath depose and say that I am the defendant in the above-entitled cause; that during the trial of said cause, and after the rendering of the verdict therein, I did not know and had no reason to believe that the "Herbert Fuller," the vessel named in said indictment, was in any port of the United States until I was informed on the second day of February, 1897, through a letter received by my counsel from the United States attorney for said district, that the said "Herbert Fuller" had arrived and was then in the port of New York. Prior to the receipt of that letter, I was informed and believed that said vessel was in South America.

(Signed) THOMAS M. BRAM.

The above was duly sworn to on the tenth day of February, A. D. 1897.

258 The testimony of the said sailor Charles Brown, referred to in said affidavits of Spencer, Messenger, and Downey, was as follows:

Q. (By Mr. COTTER, of counsel for defendant.) Off part of the window, I understand you to say?

A. Yes, sir. It (a ladder) lay against the small hatch off here.

Q. Small what?

A. Hatch.

Mr. HOAR. Hatch.

Q. Hatch?

A. And went down to the last hatch.

Q. It extended up over the window, didn't it?

A. Off part of the window.

Q. It went up over the window?

A. Yes, sir.

Q. Did you do anything that night between twelve and two o'clock other than hold onto that wheel?

A. No, sir.

Q. How did you hold it?

A. I hold onto my wheel in this way [illustrating].

Q. One hand or both?

A. Both hands, sir.

Q. All the time?

A. All the time, sir; one hand on each spoke.

Q. From twelve o'clock until two?

A. Till two, sir.

259 Q. Where did you stand in reference to the center of the wheel?

A. Stand on the starboard side, sir; here, sir [pointing on the model].

Q. Are you now sure that you never took both hands or either hand off of that wheel between twelve and two o'clock?

A. I was bound to use both hands on that wheel, sir.

Q. Well, did you use them all the time?

A. I used them, sir.

Q. From twelve to two o'clock?

A. I used them, sir.

Q. Both hands?

A. Both hands. The vessel was running fast.

Q. You never took off the two hands?

A. Never, sir.

Q. Or either one of them?

A. Neither one of them, sir.

Q. Until you were relieved from the wheel?

A. Yes, sir.

Q. And do you wish to be understood as saying that, standing there before that wheel, holding on with both hands——

A. Yes, sir.

Q. That you could see and did see into that aftercabin?

A. Well, I could see over——

Q. Did you see into the aftercabin, holding with both hands?

A. Yes, sir.

260 Q. Holding the wheel with both hands?

A. Yes, sir.
Q. And standing erect, were you?
A. Yes, sir.
Q. As you are now?
A. As I am now, sir.
Q. What?
A. As I am now.
Q. As you are now?
A. Yes, sir.
Q. Very well. And working the wheel?
A. Working the wheel, sir.
Q. And while in that position these different things that you have described to this jury you saw, did you?
A. Yes, sir.
Q. Did you see any lantern?
A. No, sir.
Q. Could you see the clock from where you were?
A. No, sir.
Q. Could you see the man's face from where you were——
A. No, sir—which, beg pardon?
Q. The man on the lounge or bunk?
A. No, sir.
Q. Did you know that the captain occupied that apartment?
A. I beg pardon, sir.
Q. Did you know that the captain occupied that room or slept there?
A. No, sir.

261 Beside the testimony of Brown above given, as read to the affiants, Brown testified on his direct examination at the trial of said cause, in regard to his position at the wheel, as follows:

Q. You heard some noise first?
A. Yes; I was scared and took a jump to myself.
Q. What did you do?
A. I looked through the window on the starboard side, about 4 ft. away from me; I saw the bed was upset.
Q. What bed?
A. The bed the captain was sleeping in. I saw the man lying down on the floor.
Q. Saw the man lying down on the floor?
A. Yes, sir.
Q. How much of him could you see?
A. I could see about half his body, from his feet up.
Q. From his feet up?
A. Yes, sir.
Q. About half his body?
A. About half.
Q. Then what did you do?
A. I looked at my compass again.

* * * * * * *

A. I just looked at my compass to see. I saw somebody standing in the cabin through the window. I saw there was——
Q. You saw somebody standing there?

A. Down in the cabin in front of that window.

262 Q. Down in the cabin in front of that window; who was that?

A. The mate, Bram, sir.

Q. What did he have on?

A. A dark suit of clothes, I don't know what else, and a straw hat.

* * * * * * *

A. I saw him lift a weapon—I could not say what kind of a weapon it was—I saw the handle.

A. It looked to be on an axe; it was a long handle.

Q. What then did you see?

A. I saw a blow fall in the same direction of the captain's head.

Q. You saw a blow fall?

WEBB, J. Were there one or two hands raised?

Q. Did you see how Bram held that weapon?

A. No, sir; only saw the blow fall.

Q. Do you know whether he held it in one hand?

A. Only in his right had, sir.

Q. Only in his right hand. Then did you see him do anything more?

A. No, sir; he walked right out. So I be awfully scared and nervous.

Q. So you were awfully scared and nervous?

A. Yes, sir.

Q. And where did he walk to?

A. He walked right out from the cabin, sir; from the captain's room.

263 Q. Did you see where he went after that?

A. No, sir.

Q. When you looked through that window, how did you hold the wheel?

* * * * * * *

A. I stand so far away from the spindle [indicating].

Q. How far from the spindle did you stand?

A. About a foot, sir.

Q. Which side of it were you then?

A. Starboard side, sir.

Q. Now, when you were looking through the window, what were you holding on to?

A. To the spokes of that wheel.

* * * * * * *

Q. Did you hold on the wheel when you looked through the window?

A. Yes, sir.

Q. With how many hands

A. Both hands.

And on his cross-examination, as follows:

Q. How much light was there in that room?

A. Well, the light was like a lamp that was turned down; but there was light enough for me to see the man inside that window.

Q. Let me see if I understand you. Did you say, like a lamp would be turned down?

A. Yes, sir.

Q. I was not sure whether you said turned down or trimmed down.

264 A. Turned down.

Q. Turned down?

A. Yes, sir.

Q. You knew that the lamp was in the forward or main cabin, didn't you?

A. I not know where it was.

No other testimony was introduced at the hearing upon this motion other than that contained in said affidavits. It had appeared, however, in evidence at the trial, that on the 31st of July, 1896, the defendant and said Charles Brown were brought before F. S. Fiske, esq., United States commissioner, in Boston, on the charge of killing the persons murdered on board the "Herbert Fuller;" that the defendant was represented at that hearing by James E. Cotter, esq., who was subsequently, at the defendant's request and designation, assigned by this court as one of his counsel; that at said hearing, in the presence of the defendant, the said passenger Monks and the said sailor Loheac testified and were cross-examined at length. At said hearing it appeared that the said murders were committed shortly before two o'clock in the morning of July 14th, 1896, and that from 12 to 2 o'clock on said morning the defendant was officer of the watch, and at said time it was sailor Brown's proper station at the wheel; that at that hearing the passenger Monks testified that Brown told him (Monks) that he saw the mate kill the captain, but nothing was stated as to how or where Brown stood.

265 Said sailor Loheac testified before said commissioner that he relieved Brown at the wheel just after two o'clock on the morning of the murders, and heard a gurgle sound in the after cabin; that he heard Monks call the defendant and then saw defendant and Monks go down into the cabin; that as he stood with his hand on the wheel, he looked through the window on the starboard side of the after house and observed the light being taken from the main cabin into the passenger's room, placed on the floor in the doorway, and saw the mate and passenger in the passenger's room, where the passenger was putting on some clothing; that he saw in the chart room a heap of clothing lying on the floor; that the lantern was usually hanging under a skylight over the table in the main cabin and lighted. It was a hand lantern hanging on a hook. Said Monks also testified before said commissioner that after he awoke and called the defendant, the defendant went down in the cabin with him and took the light which hung over the table and went to Monks's room with it. It appeared that before the vessel arrived at Halifax the defendant was told that Brown said he saw the defendant kill the captain.

The "Herbert Fuller" left Halifax for Rosario in the Argentine Republic on the 15th day of August, 1896, and did not return to the United States until after the rendering of the verdict in this case.

The testimony of said Charles Brown was the only direct evidence of the killing offered by the Government at the trial.

266 Hugh G. Messenger, who made one of said affidavits, was called as a witness by the defendant in the original trial, and testified that he was a ship carpenter; that on August 5, 1896, he left Boston

for Halifax, and went on board the "Herbert Fuller," and made measurements on the 7th and 8th of that month; that he made note of his observations and measurements; that he went to Halifax for that purpose at the request of James E. Cotter, of counsel for the defendant.

He further testified on his direct examination as follows:

Q. Was your attention called particularly to the window on the starboard side of the rear part of the after house, the window leading into the chart room?

A. It was.

Q. Did you make any measurements from the wheel to that window?

A. Do you mean the chart room or the after cabin?

Q. Well, it has been called the chart room. I mean the after cabin, the starboard after room of the after cabin?

A. I did make measurements.

Q. Where the captain's remains were found?

A. Yes, sir; I did.

Q. Did you make any measurements standing at the wheel to ascertain whether there standing you could see anything in the window of the after cabin?

A. I did.

Q. With both hands on the wheel, could you see anything in that cabin?

267 A. With both hands on the wheel I could not see anything in the cabin.

Q. Then what did you do?

A. I tried the experiment with one hand on the wheel, and I could see a little light in the room.

Q. How far out did you lean? You may show.

A. I took hold of the handle of the wheel like that, and leaned forward and looked in——

Q. (By COLT, J.) In the daytime?

A. Yes, sir.

Q. (By WEBB, J.) What time in the day?

A. Two o'clock in the afternoon.

Q. How was the ship lying as to east and west?

A. The ship lay east and west, the bow pointing east and the stern west.

Cross-examination:

Q. (By Mr. HOAR, the district attorney.) What were your instructions about going down there?

A. My instructions were to go to Halifax and to see and find out what I could about this case, to make plans, to draw up the plans of the cabin, also of the house.

268 He further testified that before he arrived in Halifax the cabin had been washed and cleaned up, and that he (the witness) went particularly to make measurements of the vessel.

Jonathan Spencer, a Government witness at the trial, on cross-examination testified that he had tried at different times to look into the after cabin window while at the wheel to speak to Mrs. Nash, but could see nothing inside the cabin until he stepped up close to the window; that "you might just see the end of the work inside the cabin."

Q. What do you mean; the plastering you mean?

A. The moulding of the window.

Q. The moulding of the window?

A. Yes, sir.

Q. The moulding was the only thing you could see standing at the wheel with both hands on it?

A. Yes, sir; that is all I see.

Q. (By WEBB, J.) This, you say, was in the daytime about four o'clock?

A. Once at 4 o'clock, and once about 10 in the morning.

The second motion for a new trial came on to be heard on February 10th, 1897, the decision on the first motion for a new trial having been pronounced on the preceding day. At the hearing on this motion counsel for the defendant introduced in support of the motion said affidavits, and affidavits of the defendant and his counsel hereinbefore set forth,
269 and read the evidence of Brown hereinbefore set forth, to show the materiality of the affidavits.

There was no evidence that Brown had stated to anyone before the trial just where he was standing or what his position was when (as he testified) he saw the defendant kill Captain Nash.

While Messenger was in Halifax, the defendant and said Charles Brown were held without bail in jail in Boston charged with murder. All the crew were held there in jail as Government witnesses, being unable to give the bail required of them, except the steward Spencer, who furnished bail and was then at his home in Brooklyn, New York.

The passenger, Monks, was at his home in Brookline, Massachusetts.

It appeared at the trial that when the defendant was first taken into custody in Halifax, all the money in his possession, to wit, about twenty-eight dollars, was taken from him by the Halifax authorities and turned over to the United States officials. It was not returned to the defendant.

It appeared that every living person who was on board the "Herbert Fuller" immediately after the murders were committed, were brought to Boston with the defendant, and that none of them returned to Halifax or Nova Scotia.

On the 6th of November, 1896, on the written application of the defendant hereinafter set forth, the court assigned to him the counsel who conducted the defence, namely, James E. Cotter, esq.

270 The foregoing are all the facts material to the issues raised by said motion for a new trial.

On the 12th day of February, 1897, the court denied the motion for a new trial on the ground of newly discovered evidence, and in denying it delivered the following opinion in open court:

"COLT, J. In order to entitle a party to a new trial on the ground of newly discovered evidence, it must appear that the evidence is new; that it is not cumulative; that it is directed to the substantial proof of some question of fact in the case, and that its purpose is not merely to discredit some witnesses who testified at the trial, and that the party asking for a new trial could not, by the exercise of reasonable diligence, have produced the evidence at the trial.

"The present motion must be determined by these principles.

"In so far as the proposed evidence consists of experiments by particular persons under some alleged circumstances on board the "Herbert Fuller" while she lay in the port of New York, it is new.

"But in so far as it is evidence touching the fact in issue of the ability of one standing at a particular point on the vessel's deck to see into her cabin through a particular window, it is not new.

"On that point the defence at the trial offered evidence after the prosecution had produced evidence to the same point, and that which is now proposed is cumulative.

271 "Such evidence would be to the same matter and of the same nature, since both Spencer and Messenger testified that they had tried and could not see through that window into the cabin.

"Could the alleged new evidence have been had at the time of the trial by the exercise of reasonable diligence on the part of the defence?

"Upon this question the court entertains no doubt. It was early known that the homicide was committed during that part of the night when Bram was the officer of the watch, and when Brown was at the wheel; that Brown had stated that he saw Bram kill the captain, and consequently he must claim that he had seen into the cabin and into that portion of it where the captain was killed.

"It was also known that those events were in the night time, between midnight and 2 o'clock in the morning. Those particulars being known, the question whether Brown could have seen into the cabin and could have seen what he said he did, would at once force itself upon the mind, and was of such vital importance that it should have been promptly and thoroughly investigated. Investigation would have been easy.

"The "Herbert Fuller" remained in the port of Halifax, an accessible place, from the 5th or 6th of August, when the facts above enumerated were known to the defendant's counsel and after they had sent a special messenger to examine and measure her, until August 15th, a period of ten days.

There were persons enough in Halifax who might have been
272 called to make all possible tests into seeing into that cabin. The very Mr. Messenger who was specially sent to investigate, and who is one of the witnesses from whom new evidence on this point is proposed to be secured, was there and went on board the vessel, and did make some trial of the ability to see into the cabin, but neither he nor any other person, during all that time, made or was instructed to make any thorough examination in that regard.

"Nothing was done in New York after the ship's return from South America that could not as well have been done while she was lying in the port of Halifax, except the alleged reproduction by Spencer of the arrangement of light and furniture.

"That arrangement was not of an essential character for the determination of the particular question. Diligence would have secured before the trial all the substantial evidence now set up in support of the motion for a new trial.

"Under well settled and familiar rules of law the motion must be denied."

Whereupon the defendant excepted to the rulings, conclusions and findings of the court on questions of law as contained in said opinion as follows:

To the conclusion of law that the evidence contained in the affidavits of Spencer, Messenger, and Downey, hereinbefore referred to, was cumulative evidence.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

To the conclusion of law that the facts show laches on the part of the defendant, or his counsel, in not being prepared with the evidence
273 of the facts contained in said affidavits at the trial.

Upon that, the court declined to allow the exceptions, but stated it would certify what the defendant claimed, that if the court erred in not allowing, the defendant might have the benefit thereof.

The assignment of Mr. Cotter as counsel for the defendant was made in compliance with the following request:

To the Honorable Justices of the Circuit Court of the United States for the District of Massachusetts:

I respectfully represent that I am accused of the crime of murder, as more fully appears by the record of said court in case United States against Bram, now pending. I am without means with which to defend myself, and respectfully request that the court assign to me as counsel James E. Cotter, esq., who at the request of myself and friends has been representing me since I was charged with the aforesaid offence in this district.

Boston, Nov. 6, 1896.
(Signed) THOMAS M. BRAM.

Subsequently Mr. French was assigned as associate counsel upon the defendant's oral reques

274 The defendant was present throughout all the proceedings in the case except where otherwise specifically noted, to wit, when Judge Aldrich made an order as to certain jurors prior to December 14th, 1896, as hereinbefore set forth.

The defendant presented his bill of exceptions, claiming to make part of the same the full stenographic report of the evidence and all proceedings at the trial, covering more than two thousand typewritten pages, and as all specified exceptions taken and allowed appear the court deemed that such a course was improper, and refused to insert that report, but at the request of the defendant's counsel orders the clerk to forward to the Supreme Court a copy of the same, in order that it may be available to the defendant if in this refusal the court erred.

And inasmuch as the several matters and things above referred to and set out do not otherwise appear of record the defendant prays that this bill of exceptions, if found correct, may be signed by the court and made part of the record in this cause.

By his attorneys:

JAMES E. COTTER.
ASA P. FRENCH.

The foregoing bill of exceptions is allowed and ordered to be entered of record in the case.

LE BARON B. COLT,
U. S. Circuit Judge.
NATHAN WEBB,
U. S. District Judge.

MARCH 4, 1897.

[Here follows diagram marked p. 274*a*.]

275 On the fourth day of March, A. D. 1897, upon motion of the attorney for the United States made in the presence of the prisoner, the court assigns March 9th current as the day for entering judgment upon the verdict, and on the same day, in the presence of the prisoner, orders that a certified copy of the evidence taken in the cause be forwarded to the clerk of the Supreme Court of the United States to accompany the transcript of record therein, but not as part thereof.

On the ninth day of March, A. D. 1897, a motion is made by the United States attorney, in the presence of the prisoner, that sentence be now imposed upon the prisoner pursuant to the verdict rendered by the jury on the second day of January, A. D. 1897, that the defendant is guilty of the murder of Charles I. Nash. Thereupon the Honorable Le Baron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, sitting together and holding the court as aforesaid, the prisoner being called and being asked if he has anything to say why the sentence of death should not be pronounced against him according to law, replies that he is innocent of the crime with which he is charged.

The court thereupon pronounces sentence as follows:

All things having been fully heard and understood by the court, it is ordered that the verdict of the jury be confirmed, and that you, Thomas M. Bram, be taken back to the place from whence you came and there remain in close confinement until Friday, the eighteenth day of
276 June, in the year of our Lord one thousand eight hundred and ninety-seven, and on that day, between the hours of eleven o'clock in the forenoon and two o'clock in the afternoon, you, the said Thomas M. Bram, be taken thence to the place of execution and that you there be hanged by the neck until you are dead.

And may God, of His infinite goodness, have mercy on your soul.

On the ninth day of March, A. D. 1896, the defendant files an affidavit that because of poverty he is unable to pay the costs of prosecuting his writ of error. The court thereupon orders that the clerk of this court prepare the transcript of record for the Supreme Court, and all necessary papers on the prosecution of his writ of error, without cost to the defendant.

A true record. Attest:

ALEX. H. TROWBRIDGE, *Clerk.*

277 *Clerk's certificate.*

UNITED STATES OF AMERICA, *District of Massachusetts, ss:*

I, Alexander H. Trowbridge, clerk of the circuit court of the United States for the district of Massachusetts, within the first circuit, certify that the foregoing is a true copy of the record in the cause entitled No. 1790, criminal docket, United States by indictment v. Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, in said circuit court determined, and that annexed hereto are true and attested copies of the petition for writ of error, the assignment of errors, filed in the circuit court March 9, 1897, and the original citation on writ of error with acknowledgment of service thereon, all constituting true and attested copies of the record and proceedings in said cause with all things concerning the same.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

278 Circuit court of the United States, district of Massachusetts.

UNITED STATES BY INDICTMENT
v.
THOMAS BRAM, ALIAS. } No. 1790. Criminal docket.

Petition for writ of error. (*Filed March 9, 1897.*)

To the clerk of the circuit court of the United States for the district of Massachusetts:

Your petitioner, Thomas M. Bram, the defendant in the above entitled cause, respectfully represents that at the October term, 1896, of this court, he was convicted on indictment No. 1790, charging him with the crime of murder upon the high seas, and that said court has pronounced judgment and sentence of death upon this petitioner on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings in the trial of this cause in said court there is great and manifest error, to the prejudice and great damage of your petitioner. He, therefore, prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said court, in said cause, remanding the said cause and the record therein to the said Supreme Court, in order that
279 the same may be there reexamined and, if error be found, that the said judgment and sentence against him therein be reversed.

THOMAS M. BRAM.
By JAMES E. COTTER and
ASA P. FRENCH,
His Counsel.

A true copy. Attest:

ALEX. H. TROWBRIDGE, *Clerk.*

280 Circuit court of the United States, district of Massachusetts.

UNITED STATES BY INDICTMENT
v.
THOMAS BRAM, ALIAS. } No. 1790. Criminal docket.

Assignment of errors. (*Filed Mar. 9, 1897.*)

And now comes Thomas M. Bram, the defendant in the above entitled cause, and files this his assignment of errors committed upon the trial of said cause, and in the matter of certain motions made by the defendant both before and subsequent to said trial, to wit:

1. The court erred in overruling the defendant's plea in abatement.

2. The court erred in overruling the defendant's supplemental plea in abatement.

3. The court erred in refusing to rule that one of the grand jurors (Merrill) was not duly sworn before the grand jury considered the evidence against said defendant and returned the indictment into court.

4. The court erred in holding that two or more facts in said indictment referring to the same transactions or occurrences might properly be joined without an averment that they referred to the same transactions or occurrences.

281 5. The court erred in overruling the defendant's motion to quash.

6. The court erred in overruling the defendant's challenge to the array.

7. The court erred in holding that the defendant's objection to the apportionment of jurors was not well taken.

8. The court erred in ruling that the neglect of the constable of Cambridge, to whom was committed the venire regularly issued under the seal of this court, was no ground for challenging the array.

9. The court erred in ruling that the venires had been properly served except that which ran to Cambridge; that the challenge to the array could not be supported; and that the jurors had been legally and properly drawn, summoned, and returned, and were fit to be empanelled to try the case.

10. The court erred in ruling that the jurors mentioned in the order of Judge Aldrich were as regularly summoned and attending as those who had been summoned pursuant to the venires ordered on the seventeenth day of November.

11. The court erred in overruling the challenge for cause to the juror Solomon C. Atwood.

12. The court erred in overruling the challenge for cause to the juror Martin Best.

13. The court erred in refusing to strike out the answer of the witness Leahan, to the effect that "The door between the passenger's room and Mrs. Nash's room was locked."

14. The court erred in permitting the witness Power to testify to the conversation between him and the defendant at Halifax, while the defendant was in custody.

282 15. The court erred in not permitting the defendant to ask the witness Power on cross-examination: "What other articles, belonging to the defendant, did you take possession of at that time?"

16. The court erred in permitting the witness Anderson to answer the following question put to him, during the Government's case in chief, by the U. S. attorney: "If the vessel is on the starboard tack, and under full sail, and the sheet is eased off, and the wind coming a point or two aft on the starboard quarter, and you take your hand off the wheel, what would happen to her?"

17. The court erred in permitting the witness Loheac to answer the following question put to him by the United States attorney: "If you were steering that vessel when she was sailing in a six or seven knot breeze and she was under full sail on the starboard tack, with the sheets free and the wind coming a point or two aft on the starboard quarter,

what effect would it have on the vessel, what would the vessel do, if you took your hands off the wheel?"

18. The court erred in permitting the witness Slice to answer the following question put to him by the United States attorney: "When the 'Herbert Fuller' was sailing with sheet well off and all sails set, with the wind on the starboard quarter, about two points abaft the beam on the starboard tack, what would be the effect on that vessel if you took your hands off that wheel?"

19. The court erred in permitting the witness Perdok to answer the following question put to him by the United States attorney:
283 "When the 'Herbert Fuller' was sailing, say six or seven knots an hour, with the wind on the starboard quarter, a couple of points abaft the beam, and with the sheet of the spanker boom free, and all the sails on her set, what effect would it have on her if you took your hands off that wheel?"

20. The court erred in permitting the witness Perdok to answer the question: "Now what effect would it have on that vessel under these conditions, if you lashed that wheel?"

21. The court erred in permitting the witness Wassen to answer the following question put to him by the United States attorney: "Suppose the 'Herbert Fuller' was sailing the high seas at the rate of seven knots an hour with the wind abaft the beam on the starboard quarter, with the vessel on the starboard tack, with all sails set and the spanker sheet free, what effect would it have if you took your hands off that wheel?"

22. The court erred in permitting the witness Frank W. Draper to answer the question: "Whether in your opinion a man standing at the hip of a recumbent person, and striking blows on that person's head and forehead with an axe, would necessarily be spattered with, or covered with, some of the blood?"

23. The court erred in characterizing, during the progress of the trial, and while the defendant was on the witness stand, certain writings which the defendant called "duplicates" of the log, as follows: "He was making something to be used as evidence, a pure manufacture at that time."

24. The court erred in not permitting the defendant, for the purpose of meeting the suggestions of the Government that the defendant
284 misled Captain Nash at the time of shipment, to introduce certain letters of recommendation from the defendant's former employers, which the defendant testified he showed to Captain Nash.

25. The court erred in permitting the witness Loheac, in rebuttal, to describe the quantity and size of certain vomit which he saw upon the deck.

26. The court erred in permitting the witness Monks, in rebuttal, to testify in regard to the size and quantity of said vomit.

27. The court erred in permitting the witness Parker to testify in rebuttal how long it would take to go from Cayenne to Buenos Ayres.

28. The court erred in permitting the witness Monks to answer in rebuttal the following question: "When you and the mate Bram went down into the cabin, when you first called him, and he went down with you into the cabin, what, if anything, did he do in regard to the captain's feet?"

rebuttal the following question: "Did he (the defendant) stand at your door and peek out into the forward cabin through the chart-room door?"

30. The court erred in permitting the witness Monks to answer in rebuttal the following question: "While you (witness and defendant) were down in the cabin together, either in your room or on the way from your room to the forward cabin, did the mate Bram say anything to you; and if so, what?"

31. The court erred in permitting the witness Monks to answer in rebuttal the following question: "Did you have any conversation with Mr. Bram while you and he were on deck, immediately after your
285 discovering the murders, in regard to his having gone below between twelve and two o'clock?"

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33. The court erred in permitting the United States attorney, in his closing address to the jury, to argue upon evidence excluded by the court, and the court erred when the defendant excepted to this line of argument, in making the following comment: "The facts are before the jury, the fact of calling the witnesses."

34. The court erred in asking the witness Loheac the following question: "When the vessel was allowed to fall off, or get in the wind from any cause, would a person upon the deck know the facts?"

35. The court erred during the examination of the defendant in making the following comment: "The question is only meant to emphasize the other answer. He says he never did tell Mr. Monks, so if he never did, and Monks says he did, everyone will understand the consequences."

36. The court erred in characterizing a portion of the closing argument of the counsel for the defendant as "far fetched."

37. The court erred in not allowing the general exception of the defendant taken at the conclusion of the charge to the jury, and before the jury had retired.

286 38. The court erred in instructing the jury as follows:

"In respect to your duties I desire to read to you from one of the leading cases on the subject.

"The only mode provided by our Constitution and laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty can not be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows; yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, and that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or

more competent to decide it, or that more or clearer evidence will be produced on one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. But in conferring together you ought to pay proper respect to each other's opinions, and listen with a disposition to be convinced to each other's arguments. And, on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself,
287 and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath.

"And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

"I think, gentlemen, what I have said sufficiently answers the communication which you made to the court. You will therefore retire for further consideration of this case."

39. The court erred in not permitting the witness Jack at the hearing upon the first motion for a new trial to testify as to where Booth, one of the jurors, stated to him (the witness) that he obtained a certain paper, the presence of which in the jury room was one of the grounds alleged in said motion for a new trial.

40. The court erred in refusing to permit the defendant to ask the witness Jack the following question: "Before this case was finally submitted to the jury did the juror Briggs engage in conversation with you or in your hearing with reference to the defendant?"

41. The court erred in refusing to permit the defendant to ask the witness Bean at the hearing upon the first motion for a new trial to "state what was said by Mr. Briggs (a juror) as to his views of the case before it was fully submitted."

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43. The court erred in refusing to receive the affidavit of Edgar L. Bean, filed by the defendant in support of his first motion for a new trial.

44. The court erred in refusing to permit the defendant at the hearing upon said motion to ask the witness Barry the following question: "Did he (juror Briggs) state his views of the case, or of the defendant, afterwards, after he came on the panel—any views he formed?"

45. The court erred in not permitting the defendant at the hearing on said motion to ask the witness Whoriskey the following question: "Did he (juror Briggs) say anything in regard to his views of the case before the case was submitted to the jury?"

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(juror Briggs) state to you what his views were concerning the defendant Bram, or what he did before the case was finally submitted to the jury?"

47. The court erred in not permitting the defendant at the hearing on said motion to ask the witness Whoriskey the following question: "What did Mr. Briggs say, if anything, in regard to being present at the execution or the hanging of the defendant?"

289 48. The court erred in not permitting the defendant at the hearing upon said motion to ask the witness Jack the following question: "After the jurors left the court-room, on one of the days when the defendant was on the witness stand, did the juror Briggs engage in conversation in regard to the defendant with one or more of his fellows?"

49. The court erred in not permitting the defendant at the hearing upon said motion to ask the witness Jack the following question: "Did the juror Briggs say that he himself was a Freemason and that the defendant was not?"

50. The court erred in not permitting the defendant at the hearing upon said motion to ask the witness Jack the following question: "Did the juror Briggs state to you, or to others of the jurors, that the defendant is a hypocrite?"

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53. The court erred in refusing to permit the defendant to ask the witness Jack at the hearing upon the said motion the following question: "In the presence of all the jurors, and before the case was submitted to them, before the charge was delivered, did Mr. Briggs state that he made Masonic signs to the defendant and that he did not respond?"

290 54. The court erred in refusing to permit the defendant to ask the witness Jack, at the hearing upon said motion, the following question: "Did Mr. Briggs state in the presence of all the jurors, after they were empanneled and before the case was finally submitted to the jury, that he, Mr. Briggs, was a Mason, and that the defendant was not, and that the defendant was a hypocrite? Did he make this statement to all of the jurors?"

55. The court erred in refusing to permit the defendant to ask the witness Jack, at the hearing upon said motion, the following question: "Did he state, immediately upon entering the jury room, after the case had been submitted to the jury and they had retired for deliberation, in the presence of all the jurors, that he should like to be present at the execution of the defendant?"

56. The court erred generally in permitting the Government, at the close of the evidence introduced by the defendant in support of said motion, to introduce any testimony in reply to that introduced by the defense, and specifically in permitting the witnesses Ford and Briggs to testify.

57. The court erred in not ruling, at the close of the evidence upon said motion for a new trial, as follows:

(1) There is no sufficient evidence in the case to establish the fact that the communication described in Booth's affidavit was harmless.

(2) A communication of that character is absolutely forbidden and sufficient to invalidate the verdict.

(3) The conduct of the bailiffs and other officers in charge of
291 the jury, as described by the evidence in the hearing on motion, is such an irregular invasion of the right of a trial by jury as to absolutely vitiate the verdict.

(4) The officers had no right to intermeddle with and take meals with the jury after the case had been fully submitted to the jury and before the return of the verdict.

(5) It was improper and irregular for the officers in charge of the jury to permit other persons to visit or converse with the jury, as described in the evidence taken at the hearing on the motion for a new trial.

(6) It is vital in capital cases that the jury should pass upon and determine the case free from external causes.

(7) Upon all the evidence introduced at the hearing, it is the duty of the court to set aside the verdict of the jury and to order a new trial.

(8) That the communication found in Booth's hat was possibly prejudicial and invalidates the verdict. It cannot be said that its harmlessness was apparent. The burden is upon the Government to show affirmatively that it was harmless.

58. The court erred in ruling, in substance, that comment made by one of the jurors during the trial was not admissible in evidence under said motion.

59. The court erred in holding that the paper found in the juror Booth's hat under the circumstances testified to would not invalidate the verdict.

60. The court erred in ruling, in substance, that something more than a mere suspicion of misconduct on the part of a bailiff, or a stranger, is necessary in order to warrant the setting aside of a verdict.

292 61. The court erred in ruling that the interruption by the court of and comment upon the final argument of the defendant's counsel, where the court stated that a certain portion of said argument was "farfetched," was not a cause for granting a new trial.

62. The court erred in finding as a fact that the jurors called denied the evidence of bias.

63. The court erred in refusing to allow the defendant's exceptions taken in connection with the first motion for a new trial.

64. The court erred in ruling that the evidence contained in the affidavits of Spencer, Messenger, and Downey, filed in support of the motion for a new trial on the ground of newly-discovered evidence, was cumulative evidence.

65. The court erred, in disposing of said last-named motion, in ruling that the facts show laches on the part of the defendant or his counsel in not being prepared with the evidence of the facts contained in said affidavits at the trial.

66. The court erred in refusing to allow the exceptions taken by the defendant at the conclusion of the opinion upon the motion for a new trial upon the ground of newly discovered evidence.

67. The court erred in its conclusions of law that the second motion for a new trial "must be overruled."

THOMAS M. BRAM,
By JAMES E. COTTER,
ASA P. FRENCH,
His Counsel.

A true copy. Attest:

ALEX. H. TROWBRIDGE, *Clerk.*

293 *Citation on writ of error.*

UNITED STATES OF AMERICA, ss.

The President of the United States, to the United States of America, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, on the * sixth day of April next, pursuant to writ of error filed in the clerk's office of the † circuit court of the United States for the district of Massachusetts, in a cause entitled United States by indictment versus Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, wherein the said Thomas Bram, so otherwise called as aforesaid, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, judge of the circuit court of the United States for the district of Massachusetts, and the Honorable Nathan Webb, district judge of the United States for the district of Maine, duly assigned to hold said circuit court, this ninth day of March, in the year of our Lord one thousand eight hundred and ninety-seven.

LE BARON B. COLT,
U. S. Circuit Judge.

NATHAN WEBB,
Dist. Judge.

294 *Acknowledgment of service on citation on writ of error.*

MARCH 9, 1897.

Due service of the within citation is hereby acknowledged.

SHERMAN HOAR,
United States Attorney for the District of Massachusetts.

295 (Indorsement on cover:) Case No. 16,541, Massachusetts, C. C. U. S. Term No. 340. Thomas Bram, otherwise called Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, plaintiff in error, vs. The United States. Filed March 27, 1897.

* Not exceeding 30 days from the day of signing.
† Name of court to which writ of error is directed.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 340.

THOMAS BRAM, ALIAS, PLAINTIFF IN ERROR, v. THE UNITED STATES.

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1 SUBSTITUTED ASSIGNMENT OF ERRORS.

And now comes Thomas M. Bram, the defendant in the above-entitled cause, and files this, his assignment of errors committed upon the trial of said cause, and in the matter of certain motions made by the defendant both before and subsequent to said trial, as a substitute for his assignment of errors heretofore filed, to wit:

1. The court erred in overruling the defendant's plea in abatement.

2. The court erred in overruling the defendant's supplemental plea in abatement.

3. The court erred in refusing to rule that one of the grand jurors (Merrill) was not duly sworn before the grand jury considered the evidence against said defendant and returned the indictment into court.

4. The court erred in holding that two or more counts in said indictment referring to the same transactions or occurrences might properly be joined without an averment that they referred to the same transactions or occurrences.

2 5. The court erred in overruling the defendant's motion to quash.

6. The court erred in overruling the defendant's challenge to the array.

7. The court erred in holding that the defendant's objection to the apportionment of jurors was not well taken.

8. The court erred in ruling that the neglect of the constable of Cambridge, to whom was committed the venire regularly issued under the seal of this court, was no ground for challenging the array.

9. The court erred in ruling that the venires had been properly served except that which ran to Cambridge; that the challenge to the array could not be supported; and that the jurors had been legally and properly drawn, summoned, and returned, and were fit to be empanelled to try the case.

10. The court erred in ruling that the jurors mentioned in the order of Judge Aldrich were as regularly summoned and attending as those

who had been summoned pursuant to the venires ordered on the seventeenth day of November.

11. The court erred in overruling the challenge for cause to the juror Solomon C. Atwood.

12. The court erred in overruling the challenge for cause to the juror Martin Best.

13. The court erred in refusing to strike out the answer of the
3 witness Leahan, to the effect that "the door between the passenger's room and Mrs. Nash's room was locked."

14. The court erred in permitting the witness Power to testify to the conversation between him and the defendant at Halifax while the defendant was in custody, as follows: "When Mr. Bram came into my office I said to him, 'Bram, we are trying to unravel this horrible mystery.' I said 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said, 'He could not have seen me; where was he?' I said, 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said, 'Now look here, Bram, I am satisfied that you killed the Captain, from all I have heard from Mr. Brown, but,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice you should say so, and not have the blame of this horrible crime on your own shoulders.' He said, 'Well, I think, and many others on board the ship think, that Brown is the murderer, but I don't know anything about it.' He was rather short in his replies.

"Q. Anything further said by either of you?

"A. No; there was nothing further said on that occasion."

15. The court erred in not permitting the defendant to ask the witness Power, on cross-examination, "What other articles belonging to the defendant did you take possession of at that time?"

16. The court erred in permitting the witness Anderson to answer the following question put to him during the Government's case in
4 chief by the United States attorney: "If the vessel is on the starboard tack and under full sail and the sheet is eased off and the wind coming a point or two aft on the starboard quarter and you take your hand off the wheel what would happen to her?" To which question the witness answered, "The vessel would either keep off or go in the wind."

17. The court erred in permitting the witness Loheac to answer the following question put to him by the United States attorney: "If you were steering that vessel when she was sailing in a six or seven knot breeze and she was under full sail on the starboard tack, with the sheets free and the wind coming a point or two aft on the starboard quarter, what effect would it have on the vessel; what would the vessel do if you took your hands off the wheel?" To this question the witness answered as follows: "She would either fall off or come to the wind, sir."

18. The court erred in permitting the witness Slice to answer the following question put to him by the United States attorney: "When the Herbert Fuller was sailing with sheet well off and all sails set, with the wind on the starboard quarter, about two points abaft the beam on the starboard tack, what would be the effect on that vessel if you took your hands off that wheel?" To this question the witness answered as follows: "She would come up to the wind, sir."

19. The court erred in permitting the witness Perdok to answer the following question put to him by the United States attorney: "When the Herbert Fuller was sailing, say six or seven knots an hour,
5 with the wind on the starboard quarter, a couple of points abaft the beam, and with the sheet of the spanker boom free, and all the sails on her set, what effect would it have on her if you took your hands off that wheel?" To this question the witness answered as follows: "You take it off and the spanker must come over at the same time; if you took your hands off, the vessel would fall off and the spanker would want to go over to the leeward side—right over, if it stayed that way. If it was over on the port side, it would go over to starboard."

20. The court erred in permitting the witness Perdok to answer the question: "Now, what effect would it have on that vessel, under these conditions, if you lashed that wheel?" To this question the witness answered as follows: "Just the same."

21. The court erred in permitting the witness Wassen to answer the following question put to him by the United States attorney: "Suppose the Herbert Fuller was sailing the high seas at the rate of seven knots an hour, with the wind abaft the beam on the starboard quarter, with the vessel on the starboard tack, with all sails set and the spanker sheet free; what effect would it have if you took your hands off that wheel?" To this question the witness answered as follows: "She would come up to the wind or keep off."

22. The court erred in permitting the witness Frank W. Draper to answer the question, "Whether in your opinion a man standing at the hip of a recumbent person, and striking blows on that person's
6 head and forehead with an axe, would necessarily be spattered with, or covered with, some of the blood?" To this question the witness answered as follows: "My answer is, that under the conditions framed in the question, the assailant in such a case would not necessarily receive blood spots upon his person or clothing."

23. The court erred in characterizing, during the progress of the trial and while the defendant was on the witness stand, certain writings, which the defendant called "duplicates" of the log, as follows: "He was making something to be used as evidence, a pure manufacture at that time."

24. The court erred in not permitting the defendant, for the purpose of meeting the suggestions of the Government that the defendant misled Captain Nash at the time of shipment, to introduce certain letters of recommendation from the defendant's former employers, which the defendant testified he showed to Captain Nash.

25. The court erred in permitting the witness Loheac, in rebuttal, to describe the quantity and size of certain vomit which he saw upon the deck as follows: "It was about as large as the top of a spittoon."

26. The court erred in permitting the witness Monks, in rebuttal, to testify in regard to the size and quantity of said vomit as follows: "I think there was a good deal."

27. The court erred in permitting the witness Parker to testify, in rebuttal, how long it would take to go from Cayenne to Buenos Ayres, as follows: "Not less than 75 or 80 days."

7 28. The court erred in permitting the witness Monks to answer, in rebuttal, the following question: "When you and the mate Bram went down into the cabin—when you first called him, and he went

down with you into the cabin—what, if anything, did he do in regard to the Captain's feet?" To which the witness answered as follows: "He did not go anywhere near the Captain at all."

29. The court erred in permitting the witness Monks to answer, in rebuttal, the following question: "Did he (the defendant) stand at your door and peek out into the forward cabin through the chart-room door?" To this question the witness answered as follows: "No, sir; he did not."

30. The court erred in permitting the witness Monks to answer, in rebuttal, the following question: "While you (witness and defendant) were down in the cabin together, either in your room or on your way from your room to the forward companionway, did the mate Bram say anything to you, and, if so, what, about going into Mrs. Nash's room?" To this question the witness answered as follows: "He said nothing at all, sir, about it; didn't mention it."

31. The court erred in permitting the witness Monks to answer, in rebuttal, the following question: "Did you have any conversation with Mr. Bram, while you and he were on deck immediately after your discovering the murders, in regard to his having gone below between twelve and two o'clock?" To which question the witness answered: "He told me he had not been below since twelve o'clock, when he had the drink with the second mate."

32. The court erred in permitting the witness Monks to answer, in rebuttal, the following question: "Whether or not the first mate
8 (Bram) got up and walked in the direction of the second mate's room, and whether or not you called him back." To which question the witness answered: "He did not get up at all; and I did not call him back, because he did not get up."

33. The court erred in permitting the United States attorney, in his closing address to the jury, to argue upon evidence excluded by the court, and the court erred, when the defendant excepted to this line of argument, in making the following comment: "The facts are before the jury, and the fact of calling the witnesses."

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9 respect to your duties, I desire to read to you from one of the leading cases on the subject:

"'The only mode provided by our Constitution and laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all, absolute

certainty can not be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, and that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on one side or the other. And with this view, it is your duty to decide the case if you can conscientiously do so. But in conferring together you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments. And, on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath.

"'And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows.'

"I think, gentlemen, what I have said sufficiently answers the communication which you made to the court. You will therefore retire for further consideration of this case."

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56. The court erred generally in permitting the Government, at the close of the evidence introduced by the defendant in support of said motion, to introduce any testimony in reply to that introduced by the defense, and specifically in permitting the witnesses Ford and Briggs to testify.

57. The court erred in not ruling, at the close of the evidence upon said motion for a new trial, as follows:

(1) "There is no sufficient evidence in the case to establish the fact that the communication described in Booth's affidavit was harmless.

14 (2) A communication of that character is absolutely forbidden and sufficient to invalidate the verdict.

(3) The conduct of the bailiffs and other officers in charge of the jury, as described by the evidence in the hearing on motion, is such an irregular invasion of the right of a trial by jury as to absolutely vitiate the verdict.

(4) The officers had no right to intermeddle with and take meals with the jury after the case had been fully submitted to the jury and before the return of the verdict.

(5) It was improper and irregular for the officers in charge of the jury to permit other persons to visit or converse with the jury, as described in the evidence taken at the hearing on the motion for a new trial.

(6) It is vital in capital cases that the jury should pass upon and determine the case free from external causes.

(7) Upon all the evidence introduced at the hearing, it is the duty of the court to set aside the verdict of the jury and to order a new trial.

(8) That the communication found in Booth's hat was possibly prejudicial and invalidates the verdict. It can not be said that its harmlessness was apparent. The burden is upon the Government to show affirmatively that it was harmless.

58. The court erred in ruling, in substance, that comment made by one of the jurors during the trial was not admissible in evidence under said motion.

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64. The court erred in ruling that the evidence contained in the affidavits of Spencer, Messenger, and Downey, filed in support of the motion for a new trial on the ground of newly discovered evidence, and which tended to show in substance that under the conditions existing on the night of the murder it was impossible for one standing at the wheel, as the witness Brown said he stood, to see anything in the after-cabin, was cumulative evidence.

65. The court erred in disposing of said last named motion in ruling that the facts show laches on the part of the defendant or his
16 counsel in not being prepared with the evidence of the facts contained in said affidavits at the trial.

66. The court erred in refusing to allow the exceptions taken by the defendant at the conclusion of the opinion upon the motion for a new trial upon the ground of newly discovered evidence.

67. The court erred in its conclusions of law that the second motion for a new trial "must be overruled."

THOMAS M. BRAM.
By his attorneys,
JAMES E. COTTER.
ASA P. FRENCH.

17 (Indorsed:) Case No. 16541. Supreme Court U. S. October term, 1897. Term No. 340. Thomas Bram, alias, &c., plff. in error, vs. The United States. Substituted assignment of errors. Office Supreme Court U. S. Filed Sep. 18, 1897. James H. McKenney, clerk.

18 Supreme Court of the United States, Oct. term, 1897.

THOMAS BRAM, ALIAS, }
vs. } No. 340.
THE UNITED STATES. }

AGREEMENT.

The substituted assignment of errors filed Sept. 18th, 1897, in said case may be printed as a part of the record for the use of the court and counsel.

JAMES E. COTTER,
Attorney for Plaintiff in Error.
J. K. RICHARDS,
Solicitor-General.

19 (Indorsed on cover:) Case No. 16541. Supreme Court U. S. October term, 1897. Term No. 340. Thomas Bram, alias, &c., plff. in error, vs. The United States. Stipulation that substituted assignment of errors be printed as part of record. Office Supreme Court U. S. Filed Sep. 24, 1897. James H. McKenney, clerk.

No. 762, 940.
Motion papers for D. C.
Filed May 5, 1897.

MAY 5 1897
JAMES H. McKENNEY,
CLE
824
S. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THOMAS BRAM, ALIAS, ETC., PLAINTIFF in error,
v.
THE UNITED STATES.
No. 762.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THOMAS BRAM, ALIAS, ETC., PLAINTIFF in error,
v.
THE UNITED STATES.

No. 762.

MOTION TO ADVANCE.

This is a writ of error to review a judgment of the circuit court of the United States for the district of Massachusetts sentencing the plaintiff in error to be hanged for a murder committed upon the high seas and not within the jurisdiction of any State of the United States. The plaintiff in error was brought before a United States commissioner in Boston July 28, 1896. He was indicted, tried before a jury, and on January 2, 1897, found guilty.

There are now held in jail in Boston six sailors who were witnesses in this case, who have been so held since July 28, 1896. As they are unable to furnish bail, there is seemingly no chance for their release until the case is finally determined by this court.

The Solicitor-General therefore respectfully moves the court to advance the case on the docket and set it down for hearing at the earliest day convenient to the court during the next term.

Notice of this motion has been served on counsel for the plaintiff in error, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

No. 340.

IN THE

Circuit Court of the United States,

DISTRICT OF MASSACHUSETTS.

No. 1790.

UNITED STATES, BY INDICTMENT,

vs.

THOMAS BRAM, ALIAS.

No. 1792.

SAME *vs.* SAME.

Affidavit in Support of Defendant's Plea in Abatement and Motion.

(November 12, 1896.)

I, Alexander H. Trowbridge, on oath depose and say that I am the clerk of the circuit court of the United States for the district of Massachusetts.

That I was present at the empanelling of the grand jurors who found the indictments in the above-entitled causes; that all of said jurors were duly sworn in the usual manner, ex-

cept William Merrill, Jr., who, upon being asked to stand and be sworn, said to me: "I affirm;" whereupon, the other jurors having been duly sworn, I administered to him the usual affirmation. This is all that was said by Mr. Merrill to me and all that I said or did with reference to him in connection with this matter.

ALEX. H. TROWBRIDGE.

Subscribed and sworn to before me—

BENJ. H. BRADLEE,
Notary Public.

[SEAL.]

A true copy.

[Seal of the Circuit Court, Massachusetts.]

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

[Endorsed:] Case No. 16,541. Supreme Court U. S., October term, 1897. Term No., 340. Thomas Bram, pl'ff in error, *vs.* The United States. Affidavit of Alex. H. Trowbridge in support of defendant's plea in abatement.

[Stamped:] Office Supreme Court U. S. Filed Oct. 19, 1897. James H. McKenney, clerk.

No. 778. 353.

Motion Papers for D. E.

Filed April 26, 1897.

Supreme Court of the United States.

Office Supreme Court, U. S.
APR 26 1897
JAMES H. McKENNEY,
CLERK
No. 778

BARROW STEAMSHIP COMPANY, Limited,
Plaintiff in Error,

against

MICHAEL KANE,
Defendant in Error.

Now comes the defendant in error, by his counsel appearing in that behalf, and moves the Court to advance the above-entitled cause on the docket, and respectfully shows that this cause is No. 778 on the docket of this Court. That the matter comes before this Court on a certificate from the Circuit Court of Appeals of the Second Circuit, issued in accordance with the provisions of Section VI of the Act of March 31st, 1891, establishing Circuit Courts of Appeal, &c., certifying a question of law as to which the said Circuit Court of Appeals desires the instruction of the Supreme Court for its proper decision. The action was originally brought in the Circuit Court of the United States for the Southern District of New York, for damages sustained in consequence of an assault upon the plaintiff below (above-named defendant in error), a passenger on the defendant's below (above-named plaintiff in error) steamship by persons for whose acts it was

alleged that defendant below was responsible. The plaintiff below was a citizen and resident of the State of New Jersey, and the defendant below a corporation organized under the laws of the United Kingdom of Great Britain and Ireland, doing business in New York through its regularly appointed agents. The assault was committed near Londonderry, Ireland. After answer and upon trial before a jury, and on a verdict of $7,500 judgment was entered in favor of the plaintiff below (above-named defendant in error), and the defendant below (above plaintiff in error) sued out a writ of error to the Circuit Court of Appeals for the Second Circuit to review such judgment, and the question as to which the Circuit Court of Appeals desires the instructions of the Supreme Court, as appears by said certificate, is :

"Had the Circuit Court jurisdiction to try the action and render judgment therein against the defendant ?"

That the decision of said Circuit Court of Appeals on the said writ of error is reserved, and cannot be made until the determination of the question arising on said certificate, thereby causing great delay in the final disposition of this cause to the great injury of the above-named defendant in error.

F. K. PENDLETON,
Counsel for above-named Defendant in Error for the purpose of this motion.

See in re Hohorst, 150 U. S. 653.

No. 778. 353.

Motion Papers for P. C.

FILED
APR 23
JAMES H. McKEN

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

Filed April 23, 1897.

BARROW STEAMSHIP COMPANY, LIMITED,
Plaintiff in Error.

AGAINST

MICHAEL KANE,
Defendant in Error.

No. 778.

MEMORANDUM IN BEHALF OF PLANTIFF IN ERROR, UPON MOTION TO ADVANCE CAUSE.

The plaintiff in error does not object to the advancement of this cause *provided* it does not thereby lose its right to an *oral* argument.

But plaintiff in error does most earnestly desire the opportunity to argue the cause orally before this Court, for the reason that the question of jurisdiction involved is one of considerable importance and not heretofore specifically passed upon by this Court, and although the point raised by the plaintiff in error has seemed to its counsel sufficiently clear, nevertheless the lower Court has declined to recognize it, thus making apparent the necessity of having the question presented to this Court with the fullness and clearness possible only upon an oral argument.

Besides being a matter of some general importance, the question raised is one of considerable consequence to plaintiff in error, and not at all foreign to the merits of the case.

The defendant in error has been enabled to obtain

from a jury a verdict of $7,500 against the plaintiff in error, mainly, it seems to the latter, because permitted to sue it in New York upon matters which happened in Ireland and had nothing to do with its New York business, so that it was not possible for the plaintiff in error to produce any witnesses upon the trial, but it was obliged to resort to the burdensome and, before a jury, well nigh useless method of taking evidence by commission.

It is doubtful whether the condition attached to the admission of foreign corporations into the territory of New York State, namely, that they shall submit there to suit upon causes of action arising elsewhere when the complainant is a citizen of New York, is reasonable and enforceable; but it certainly is not reasonable that it should submit to such a suit there by a citizen of New Jersey, nor anywhere in the United States unless it elects to enter the territory of New Jersey and engage in business there.

Esek Cowen
Harrington Putnam
Counsel for Plaintiff in Error.

No. 340.

Brief of Cotter for P. E.

Filed Oct. 14, 1897.

OCT 14
JAMES H. McKEN

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 340.

THOMAS BRAM, ALIAS, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES E. COTTER,
ASA P. FRENCH,
Counsel for Plaintiff in Error.

ERRATA.

Page 5, line 28, *for* "30" *read* "3"
" 6, " 2, " "30" " "3"
" 13, " 29, " "*case*" " "*cause*"
" 17, " 7, " "*sale*" " "*sail*"
" 19, " 27, " "*tell Mr. Monks, so*" read "*tell Mr. Monks so;*"
" 29, last line, " "*O'Connor*" read "*O'Connell*"
" 45, line 25, " "*Kloo*" " "*Koo*"
" 92, " 13, " "*described*" " "*discussed*"
" 77 " 5 " Whit 7 " Whit. 2
" 88 + alsewhere " Stymes " Stymean

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 340.

THOMAS BRAM, ALIAS, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

I.

Facts.

(Tr. pp. 21–23.)

On the night of the thirteenth and fourteenth of July, 1896, Charles I. Nash, master of the barkentine, the *Herbert Fuller*, Laura A. Nash, his wife, and August W. Blomberg, the second mate, were murdered in their beds on the vessel while on the high seas, bound from Boston to Rosario (*via* Buenos Ayres) in South America.

The *Herbert Fuller* left the port of Boston with a load of

lumber, on July 2, 1896, and was, when the crimes were committed, in about latitude 36° N., longitude 53° W. (Tr., Log Sheets, date July 14.) There were on board, besides the persons murdered, Thomas Bram, otherwise called Thomas M. Bram, the plaintiff in error (hereinafter called the defendant), who was first officer, a steward, six seamen, and one passenger.

The murders were committed during the first mate's watch, which began at twelve o'clock midnight. The vessel was on the starboard tack and under full sail, with the wind about two points abaft the beam on the starboard quarter. The sheets, especially the spanker sheets, were eased well off, and she was sailing at the rate of six or seven knots an hour. (Tr. p. 44.) Between twelve and two o'clock, Captain Nash, Mrs. Nash, Blomberg, and the passenger (Monks) were below in their respective separate rooms in the after-cabin (shown on plan, Tr., facing page 125); the defendant was officer of the watch on deck; two of the seamen, Loheac and Perdok, were on the lookout, and another seaman, Justus Leopold Westerberg (*alias* Charles Brown), took the wheel, which was behind the after-house, and a few feet only from the after-companionway leading down to the rooms occupied by the persons who were murdered. (Tr., Plan, facing page 125.) The steward and the rest of the crew testified that they were in their quarters in the forward house, asleep. The passenger, Monks, who occupied the room between the captain's room and that of Mrs. Nash, aroused not far from two o'clock, as he testified, by a scream and by a gurgling sound, went from his room to that of Captain Nash, and then to Mrs. Nash's room, and, upon discovering their condition, went on deck and gave the alarm to the defendant. Together, he and the defendant at once made a hasty inspection of the chart-

room, where Captain Nash's body was, and then returned to the deck, where they remained until about daybreak, when they called the steward. Upon going down into the after-cabin, it was then found that Captain Nash, his wife, and Blomberg, the second mate, were all dead, each with several wounds upon the head, apparently inflicted with a sharp instrument like an axe. Blomberg was lying on his back in his berth, with his feet crossed; Mrs. Nash was in her room, and at the back side of the bed; and Captain Nash lay on the floor, with the cot on which he had slept overturned.

The whole crew were called at about daylight and were informed of the deaths.

At first, after the discovery of the murders, there was some hesitancy as to where the vessel should be taken. At the defendant's suggestion, she was headed toward Cayenne in French Guiana, but later the plan was changed, and she steered for Halifax, N.S., where she arrived on July 21, and was taken possession of by the local authorities at the request of the Consul General of the United States.

No blood, or spots of blood, were ever discovered on the person or the clothing of the defendant. Before reaching Halifax, and a day or two after the murders had been committed, suspicion was excited in respect to the seaman Westerberg, *alias* Brown, and the crew, under the supervision of the defendant, seized and ironed him. The defendant navigated the ship until the Sunday (July 19) before the Tuesday on which they arrived at Halifax. On that day (Sunday), Brown, who was then in irons, for the first time told one or more of the other sailors that he saw into the cabin through a window in the after part on the starboard side of the house, and saw Bram, the defendant,

kill the captain. In consequence of this statement of Brown, the crew, led by the steward, suddenly overpowered the defendant and put him in irons, he making no resistance, but declaring his innocence. He and Brown were both carried into Halifax in irons. All the ship's company, including the passenger, were kept in confinement at Halifax. The defendant, while there, was brought alone before one Power, a local official detective, by whom he was told to submit to an examination, and was searched, stripped, and examined, no one else being present. The defendant was then in custody, and did everything he was directed to by Powers. (Tr. p. 42.)

Subsequently the crew, including the defendant and Brown, and the passenger Monks, were sent by steamer to Boston.

The defendant and Brown were both held for the grand jury. Brown testified before the grand jury. The defendant did not.

On October 29 the grand jury returned an indictment against the defendant for the murder of Charles I. Nash and Laura A. Nash; also an indictment against him for the murder of August W. Blomberg, *alias*. No bill was found against Brown.

At the October term, 1896, of the United States Circuit Court for the District of Massachusetts, the Honorable LeBaron B. Colt, circuit judge, and the Honorable Nathan Webb, district judge, presiding, the defendant was tried upon the first-mentioned indictment under the counts charging the murder of Charles I. Nash, — the other counts having been *nol prossed*, — was convicted of the murder of said Charles I. Nash, and sentenced to be hanged.

At the trial the defendant took the stand as a witness in

his own behalf. It was contended by the defence (Tr. p. 46), among other things, that the seaman Brown — whose duty it was, at the time when the murders were committed, to be at the wheel — had equal opportunity with the defendant to commit the murders charged, and that, under the conditions of wind and water existing on the night of the murders, he (Brown) could have lashed the wheel of the vessel and left it for a sufficiently long period to commit the crimes, without thereby causing the vessel to deviate perceptibly from her course.

Brown's testimony (see Tr. p. 118 *et seq.*) was the only direct evidence of the killing. (Tr. p. 121.)

The trial began on Monday, the fourteenth day of December, 1896, and was concluded on Saturday, the second day of January, 1897.

II.

Questions Involved and Raised by the Record.

The questions raised for the consideration of this court, and which are now pressed, may be divided into three classes: (*a*) those raised preliminary to the trial; (*b*) those raised during the trial; and (*c*) those raised in connection with the two motions for a new trial.

(*a*) *Questions Raised Preliminary to the Trial.*

(1) That the indictment was invalid because one of the grand jurors who found and returned said indictment was permitted to affirm instead of being sworn, without stating and without being asked as to the fact that he was conscientiously scrupulous of being sworn. (Tr. pp. 30, 31.) (Asst's 1, 2, 3.)

This question was raised under the plea and supplementary plea in abatement. (Tr. pp. 30, 31.)

(2) That the indictment was invalid because, one of the jurors affirming, the caption of said indictment did not recite that it was presented upon the oath *and affirmation* of the jurors. (Tr. pp. 3, 31.) (Ass't 5.)

This question was raised on motion to quash.

(3) That the array was illegal because, whereas the court on November 17, 1896 (Tr. p. 13), had ordered that special venires should issue for one hundred additional petit jurors to come in on the fourteenth day of December, 1896 (the day assigned for the trial of this case to begin), of whom fourteen were ordered to be brought in from the city of Cambridge, — the United States marshal did not comply with said order, but, in disregard thereof, returned only eighty-six men, none of whom were from the city of Cambridge. (Tr. p. 14.) (Asst's 6, 7, 8, 9.)

This question was raised on a challenge to the array. (Tr. pp. 36, 37.)

(4) That the array was illegal, further, because fourteen jurors in attendance for the regular business of the court for the October term, and included in the order of Judge ALDRICH of December 7 (Tr. p. 14), were added in lieu of the Cambridge quota; and that the apportionment among the cities and towns prescribed in the order of November 17 (Tr. p. 13), heretofore referred to, was not observed.

This question, also, was raised by challenge to the array. (Ass't 10.)

(5) That the array was illegal, further, because the subordinate venires were directed to and served by constables of the several cities and towns named in the order,

contrary to the provision of the statutes of the United States. (Tr. p. 14.) (Ass't 9.)

This question, also, was raised by challenge to the array.

(*b*) *Questions Raised During the Trial.*

(6) That the court should not have permitted the detective Power to testify (Tr. p. 43) as to the conversation between himself and the defendant at Halifax while the defendant was in custody; because, under the circumstances, the defendant's statement was not a free and voluntary statement. (Ass't 14.)

(7) That the court should have permitted the defendant, in the cross-examination of Power, and for the purpose of showing interest, to ask him, "What other articles belonging to the defendant did you take possession of at that time?" (Tr. p. 44.) (Ass't 15.)

(8) That the United States attorney should not have been permitted to ask the sailors Anderson, Loheac, Slice, Perdok, and Wassen (Tr. pp. 44–46) hypothetical questions with reference to the wheel of the vessel, the answers to which tended to show that the wheel could not have been left on the night of the murders so that the vessel would not either fall off or come up to the wind, because—

(*a*) This line of inquiry was not a legitimate part of the government's case in chief.

(*b*) The witnesses were not qualified to answer the questions. (Asst's 16 to 21, inclusive.)

(9) That Dr. Draper should not have been allowed, against the defendant's objection, to express an opinion, as an expert, as to whether a man standing at the hip of a re-

cumbent person and striking blows on that person's head and forehead with an axe would necessarily be spattered or covered with some of the blood; because —

(*a*) The question was not a proper question for an expert.

(*b*) If it were a proper question for an expert, Dr. Draper was not qualified to answer it. (Ass't 22.)

(10) That the language of Judge WEBB, in the presence of the jurors, during the cross-examination of the defendant, as to the loose sheets which the defendant had said were duplicates of the log, to wit, "He [the defendant] was making something to be used as evidence; a pure manufacture at that time" (Tr. p. 52), was a violation of the defendant's right to an impartial trial, and had a tendency to seriously prejudice him in the minds of the jury. (Ass't 23.)

(11) That the court should have permitted the defendant to introduce certain letters of recommendation from the defendant's former employers, which the defendant testified (Tr. p. 53) that he showed to Captain Nash; because, the government having claimed that the defendant at the time of shipment had misled Captain Nash as to himself and his previous career by stating certain facts which were testified to, the defendant should have had an opportunity to introduce evidence of all that was said or shown to Captain Nash by him in that connection. (Ass't 24.)

(12) That Edward G. Parker, a government witness called in rebuttal of the defendant's claim that his first suggestion to take the vessel to Cayenne was a reasonable one, inasmuch as that was the nearest port in South America on the line of their destination, should not have been allowed

to testify (Tr. p. 56) as to how long it would take to go from Cayenne to Buenos Ayres, because it appeared that he had never sailed from Cayenne to Buenos Ayres or from Cayenne to any other port in South America. (Ass't 27.)

(13) That that part of the closing argument of the United States attorney, as follows (Tr. p. 58): "He [referring to the defendant] says that Charlie Brown could leave the wheel. I say he could not. They [referring to counsel for the defendant] have produced a lot of sea captains to say that he could leave the wheel. I put on Mr. Cutler, who was a mate on that vessel, and if you can argue from the non-production of witnesses, can you not argue from the failure to put questions?" — was so improper and so prejudicial to the defendant, especially when coupled with the comment of Judge WEBB upon it, viz., "The facts are before the jury, the fact of calling the witnesses," — as to constitute reversible error, even though withdrawn: because the court had excluded the testimony to which the United States attorney referred, and which he nevertheless sought to argue to the jury by inference as if it were in. (Ass't 33.)

14. That the attitude of Judge WEBB during the trial toward the question of the guilt or innocence of the accused, as indicated by certain questions and comments in presence of the jury, were of such a nature as to deprive the defendant of a fair trial. The questions and comment to which especial reference is made are the following: —

(*a*) The question to the government witness Loheac (Tr. p. 60) (*Q.* by WEBB, J.): "When the vessel was allowed to fall off or come up in the wind from any cause, would a person upon the deck know the facts?" *A.* "Yes, sir."

(Loheac's testimony tended to show that if Brown had left the wheel, which the defence contended he could have done for a sufficient length of time to commit the murders, the course of the vessel would have been materially changed. The "person upon the deck" referred to the defendant, who was officer of the watch.)

(*b*) During the cross-examination of the defendant (Tr. p. 60 and comment: "He [the defendant] says he never did tell Mr. Monks so. If he never did and Monks says he did, every one will understand the consequences."

(*c*) The characterization of the loose sheets made up by the defendant as "a pure manufacture," to which reference has already been made, and is to be made, in this brief, in other connections.

(*d*) The characterization (Tr. p. 63), during its progress, of a portion of the closing argument of the senior counsel for the prisoner as "far-fetched." (Asst's 23, 34, 35, 36.)

(15) That the court, in a capital case, should, *in favorem vitae*, have allowed the general exception of the defendant taken at the conclusion of the charge to the jury, and before the jury had retired; viz. (Tr. p. 59), —

> "And now comes the defendant after the charge and before the jury have retired, and claims an exception to all objectionable and prejudicial matter, whether it was elicited by the government or the court, and to all statements of fact and opinion and examination of witnesses by one member of the court during the trial, which said matter, statements of fact, and opinion, and of the examination of witnesses, more specifically appear in the official stenographic report of said trial, to which reference is

hereby made at pages 1080, 1348, 1372, 1385, 1482, 1483, 1484, 1490, 1572, 1593, 2000, and *aliunde*, and whether such statements, opinions, and examinations were withdrawn or not, on the ground that "no right of exception is, or can be, waived in a capital case." (Ass't 37.)

(16) That the reading by the court to the jury, after they had deliberated between nineteen and twenty hours without arriving at a verdict (Tr. p. 63), of the statement of law found on page 63, however true such a statement may be as a general proposition, was inappropriate under the circumstances of this case, and calculated to mislead the jury, and to unduly influence the minority to conform to the opinion of the majority. (Ass't 38.)

(*c*) *Questions Raised in Connection with the Two Motions for a New Trial.*

(17) That the court (see Assignments 40, 48, 50, 53, 54) should have permitted the defendant in support of the first motion for a new trial, and in corroboration of the allegation contained in the affidavit of the juror Booth (Tr. p. 66), to wit, that one of the jurors, Briggs, during the trial and at an adjournment, while the defendant was on the stand, had said in the presence and hearing of several of the jurors, "I am a Freemason; the defendant, Bram, is not a Freemason; he is a hypocrite," to ask the juror Jack the following questions: "Before this case was finally submitted to the jury, did the juror Briggs engage in conversation with you, or in your hearing, with reference to the defendant?" Also, "After the jurors left the court-room on one of the days when the defendant was on the witness-stand, did the juror Briggs engage in conversa-

tion in regard to the defendant with one or more of his fellows?" Also, "Did the juror Briggs say that he himself was a Freemason and that the defendant was not?" Also, "Did the juror Briggs state to you, or to other of the jurors, that the defendant is a hypocrite?" Also, "In the presence of all the jurors, and before the case was submitted to them, before the charge was delivered, did Mr. Briggs state that he made Masonic signs to the defendant and that he did not respond?" Also, "Did Mr. Briggs state in the presence of all the jurors, after they were empanelled and before the case was finally submitted to the jury, that he, Mr. Briggs, was a Mason and that the defendant was not, and that the defendant was a hypocrite? Did he make this statement to all of the jurors?"

(18) That the court (see Assignments 40, 42, 44, 45, 46, 47, 48, 51, 54, 55) should have permitted the defendant, in support of the allegation contained in the motion for a new trial, of misconduct on the part of certain of the jurors, to ask certain witnesses whom he called upon this point, namely, Bean, Whoriskey, and Jack, as to certain conversations with the juror Briggs tending to show bias or misconduct on his part.

(19) That the court (see Assignment 43) should not have refused to consider the affidavit of Edgar L. Bean, filed by the defendant in support of the first motion for a new trial.

(20) That the court (see Assignment 56) should not have allowed the government, at the close of the evidence introduced by the defendant in support of the first motion for a new trial, to introduce any testimony in reply to that of the defence, because the government had not filed any counter-affidavits, or joined issue in any way upon the record, with the defendant, as to the facts alleged in his

motion or set out in the affidavits filed by him in support thereof.

(21) That the court, after receiving the supplementary affidavit of the juror Booth (Tr. p. 66), which described the experiment made by the jurors in the jury-room after the case was submitted to them, and after hearing evidence thereupon, erred in refusing to consider that evidence, and in ruling as a matter of law that it was inadmissible. (Tr. p. 107.) This question is raised by the plaintiff in error under paragraph 7 of Error 57, on the ground that the court by its said ruling (Tr. p. 107) declined to consider all the evidence offered; that evidence of the experiment should have been considered; and, if considered, it would, being uncontradicted, have been sufficient to justify the court in ordering a new trial.

(22) That the court (see Assignments 58, 59, 60), in denying the first motion for a new trial, did not exercise its discretion, but erred in ruling as matters of law, in substance, *first*, that comment made by one of the jurors during the trial was not admissible in evidence in support of the motion; *second*, that the paper found in the juror Booth's hat, under the circumstances testified to, would not invalidate the verdict; *third*, that something more than mere suspicion of misconduct on the part of the bailiff or a stranger is necessary in order to warrant the setting aside of a verdict; and *fourth*, that the interruption by the court of, and comment upon, the final argument of the defendant's counsel where the court stated that a certain portion of said argument was "far-fetched," was not a case for granting a new trial.

(23) That the court (see Assignment 63) should have allowed the exceptions taken in the course of the hearing upon the first motion for a new trial, so far at least as they

related to matters as to which the court had refused to exercise discretion.

(24) That the court (see Assignment 64) should not have ruled, as a matter of law, that the evidence contained in the affidavits of Spencer, Messenger, and Downey, filed in support of the motion for a new trial on the ground of newly discovered evidence, and which tended to show in substance that, under the conditions existing on the night of the murder, it was impossible for one standing at the wheel, as the witness Brown said he stood, to see anything in the after-cabin, was cumulative evidence, and also in holding that the motion must therefore, as a matter of law, be overruled.

(25) That the court (see Assignment 65) should not have ruled as a matter of law, in connection with this motion, that the facts (Tr. p. 124) show laches on the part of the defendant or his counsel in not being prepared at the trial with the evidence of the facts contained in said affidavits.

(26) That the court (see Assignment 66) should have allowed the exceptions taken by the defendant at the conclusion of the opinion upon the motion for a new trial upon the ground of newly discovered evidence, at least so far as they referred to matters as to which the court had refused to exercise discretion, and as to matters upon which the court had passed as questions of law.

Specification of Errors relied upon.

Sixty-seven errors are assigned in the writ of error which are set out in the printed transcript of the record, pages 127 *et seq.* In this Court, the plaintiff in error filed, on

the 18th day of September, 1897, a Substituted Assignment of Errors, in which the errors originally alleged are set out more fully and specifically in certain instances than in the assignment filed in the court below. The errors now relied upon are specified in this brief in the form in which they appear in the Substituted Assignment, and are as follows: —

1. The court erred in overruling the defendant's plea in abatement.

2. The court erred in overruling the defendant's supplemental plea in abatement.

3. The court erred in refusing to rule that one of the grand jurors (Merrill) was not duly sworn before the grand jury considered the evidence against said defendant and returned the indictment into court.

6. The court erred in overruling the defendant's challenge to the array.

7. The court erred in holding that the defendant's objection to the apportionment of jurors was not well taken.

8. The court erred in ruling that the neglect of the constable of Cambridge, to whom was committed the venire regularly issued under the seal of this court, was no ground for challenging the array.

9. The court erred in ruling that the venires had been properly served except that which ran to Cambridge: that the challenge to the array could not be supported, and that the jurors had been legally and properly drawn, summoned, and returned, and were fit to be empanelled to try the case.

10. The court erred in ruling that the jurors mentioned in the order of Judge ALDRICH were as regularly summoned and attending as those who had been summoned pursuant to the venires ordered on the 17th day of November.

14. The court erred in permitting the witness Power to testify to the conversation between him and the defendant at Halifax while the defendant was in custody, as follows: "When Mr. Bram came into my office, I said to him, 'Bram, we are trying to unravel this horrible mystery.' I said, 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said, 'He could not have seen me; where was he?' I said, 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said, 'Now look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice you should say so, and not have the blame of this horrible crime on your own shoulders.' He said, 'Well, I think, and many others on board the ship think, that Brown is the murderer, but I don't know anything about it.' He was rather short in his replies.

"*Q.* Anything further said by either of you?

"*A.* No, there was nothing further said on that occasion."

15. The court erred in not permitting the defendant to ask the witness Power on cross-examination, "What other articles, belonging to the defendant, did you take possession of at that time?"

16. The court erred in permitting the witness Anderson to answer the following question put to him, during the government's case in chief, by the United States attorney: "If the vessel is on the starboard tack, and under full sail, and the sheet is eased off, and the wind coming a point or two aft on the starboard quarter, and you take your hand off the wheel, what would happen to her?"

To which question the witness answered, "The vessel would either keep off or go in the wind."

17. The court erred in permitting the witness Loheac to answer the following question put to him by the United States attorney: If you were steering that vessel when she was sailing in a six or seven knot breeze, and she was under full sale on the starboard tack, with the sheets free and the wind coming a point or two aft on the starboard quarter, what effect would it have on the vessel; what would the vessel do, if you took your hands off the wheel?" To this question the witness answered as follows: "She would either fall off or come to the wind, sir."

18. The court erred in permitting the witness Slice to answer the following question put to him by the United States attorney: "When the *Herbert Fuller* was sailing with sheet well off and all sails set, with the wind on the starboard quarter, about two points abaft the beam on the starboard tack, what would be the effect on that vessel if you took your hands off that wheel?" To this question the witness answered as follows: "She would come up to the wind, sir."

19. The court erred in permitting the witness Perdok to answer the following question put to him by the United States attorney: "When the *Herbert Fuller* was sailing, say six or seven knots an hour, with the wind on the starboard quarter, a couple of points abaft the beam, and with the sheet of the spanker boom free, and all the sails on her set, what effect would it have on her if you took your hands off that wheel?" To this question the witness answered as follows: "You take it off and the spanker must come over at the same time; if you took your hands off, the vessel would fall off and the spanker would want

to go over to the leeward side — right over, if it stayed that way. If it was over the port side, it would go over to starboard."

20. The court erred in permitting the witness Perdok to answer the question, "Now what effect would it have on that vessel under these conditions, if you lashed that wheel?" To this question the witness answered as follows: "Just the same."

21. The court erred in permitting the witness Wassen to answer the following question put to him by the United States attorney: "Suppose the *Herbert Fuller* was sailing the high seas at the rate of seven knots an hour with the wind abaft the beam on the starboard quarter, with the vessel on the starboard tack, with all sails set and the spanker sheet free, what effect would it have if you took your hands off that wheel?" To this question the witness answered as follows: "She would come up to the wind or keep off."

22. The court erred in permitting the witness Frank W. Draper to answer the question, "Whether in your opinion a man standing at the hip of a recumbent person, and striking blows on that person's head and forehead with an axe, would necessarily be spattered with, or covered with, some of the blood?" To this question the witness answered as follows: "My answer is that under the conditions framed in the question, the assailant in such a case would not necessarily receive blood spots upon his person or clothing."

23. The court erred in characterizing, during the progress of the trial, and while the defendant was on the witness stand, certain writings which the defendant called "duplicates" of the log, as follows: "He was making

something to be used as evidence, a pure manufacture at that time."

24. The court erred in not permitting the defendant, for the purpose of meeting the suggestions of the government that the defendant misled Captain Nash at the time of shipment, to introduce certain letters of recommendation from the defendant's former employers, which the defendant testified he showed to Captain Nash.

27. The court erred in permitting the witness Parker to testify in rebuttal how long it would take to go from Cayenne to Buenos Ayres, as follows: "Not less than 75 or 80 days."

33. The court erred in permitting the United States attorney, in his closing address to the jury, to argue upon evidence excluded by the court, and the court erred, when the defendant excepted to this line of argument, in making the following comment: "The facts are before the jury, and the fact of calling the witnesses."

34. The court erred in asking the witness Loheac the following question: "When the vessel was allowed to fall off, or get in the wind from any cause, would a person upon the deck know the facts?" To which question the witness answered, "Yes, sir."

35. The court erred, during the examination of the defendant, in making the following comment: "The question is only meant to emphasize the other answer. He says he never did tell Mr. Monks, so if he never did, and Monks says he did, every one will understand the consequences."

36. The court erred in characterizing a portion of the closing argument of the counsel for the defendant as "far-fetched."

37. The court erred in not allowing the general excep-

tion of the defendant taken at the conclusion of the charge to the jury and before the jury had retired.

38. The court erred in instructing the jury as follows:

"In respect to your duties I desire to read to you from one of the leading cases on the subject.

"The only mode provided by our Constitution and laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, and that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial or more competent to decide it, or that more or clearer evidence will be produced on one side or the other. And with this view, it is your duty to decide the case if you can conscientiously do so. But in conferring together you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments. And on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a

reasonable one, which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention with an equal desire to arrive at the truth, and under the sanction of the same oath.

"And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

"I think, gentlemen, what I have said sufficiently answers the communication which you made to the court. You will therefore retire for further consideration of this case."

40. The court erred in refusing to permit the defendant to ask the witness Jack the following question: "Before this case was finally submitted to the jury, did the juror Briggs engage in conversation with you, or in your hearing, with reference to the defendant?"

41. The court erred in refusing to permit the defendant to ask the witness Bean at the hearing upon the first motion for a new trial to "state what was said by Mr. Briggs [a juror] as to his views of the case before it was fully submitted."

42. The court erred in refusing to admit, at the hearing upon the first motion for a new trial, any expression of opinion that any of the jurors had made after the trial to

third parties as to his state of mind during the progress, or as to his state of mind at the conclusion, of the trial.

43. The court erred in refusing to receive the affidavit of Edgar L. Bean, filed by the defendant, in support of his first motion for a new trial.

44. The court erred in refusing to permit the defendant at the hearing upon said motion to ask the witness Barry the following question: "Did he [juror Briggs] state his views of the case, or of the defendant, afterwards, after he came on the panel, any views he formed?"

45. The court erred in not permitting the defendant at the hearing on said motion to ask the witness Whoriskey the following question: "Did he [juror Briggs] say anything in regard to his views of the case before the case was submitted to the jury?"

46. The court erred in not permitting the defendant at the hearing on said motion to ask the witness Whoriskey the following question: "Did he [juror Briggs] state to you what his views were concerning the defendant Bram, or what he did before the case was finally submitted to the jury?"

47. The court erred in not permitting the defendant at the hearing on said motion to ask the witness Whoriskey the following question: "What did Mr. Briggs say, if anything, in regard to being present at the execution or the hanging of the defendant?"

48. The court erred in not permitting the defendant at the hearing upon said motion to ask the witness Jack the following question: "After the jurors left the court room on one of the days when the defendant was on the witness stand, did the juror Briggs engage in conversation in regard to the defendant with one or more of his fellows?"

49. The court erred in not permitting the defendant at

the hearing upon said motion to ask the witness Jack the following question: "Did the juror Briggs say that he himself was a Freemason and that the defendant was not?"

50. The court erred in not permitting the defendant at the hearing upon said motion to ask the witness Jack the following question: "Did the juror Briggs state to you, or to other of the jurors, that the defendant is a hypocrite?"

51. The court erred in not permitting the defendant at the hearing upon said motion to ask the witness Jack the following question: "Did the juror Briggs state to you, or any of his fellows in your presence, before the case was finally submitted to the consideration of the jury, 'I should like to see that man hung'?"

53. The court erred in refusing to permit the defendant to ask the witness Jack at the hearing upon the said motion the following question: "In the presence of all the jurors, and before the case was submitted to them, before the charge was delivered, did Mr. Briggs state that he made Masonic signs to the defendant, and that he did not respond?"

54. The court erred in refusing to permit the defendant to ask the witness Jack at the hearing upon said motion the following question: "Did Mr. Briggs state in the presence of all the jurors, after they were empanelled and before the case was finally submitted to the jury, that he, Mr. Briggs, was a Mason, and that the defendant was not, and that the defendant was a hypocrite? Did he make this statement to all of the jurors?"

55. The court erred in refusing to permit the defendant to ask the witness Jack at the hearing upon said motion the following question: "Did he state immediately upon entering the jury-room after the case had been

submitted to the jury, and they had retired for deliberation, in the presence of all the jurors, that he should like to be present at the execution of the defendant?"

56. The court erred generally in permitting the government, at the close of the evidence introduced by the defendant in support of said motion, to introduce any testimony in reply to that introduced by the defence, and specifically in permitting the witnesses Ford and Briggs to testify.

57 (paragraph 7 only). The court erred in not ruling, at the close of the evidence upon said motion for a new trial, as follows: Upon all the evidence introduced at the hearing, it is the duty of the court to set aside the verdict of the jury and to order a new trial.

58. The court erred in ruling, in substance, that comment made by one of the jurors during the trial was not admissible in evidence under said motion.

59. The court erred in holding that the paper found in the juror Booth's hat under the circumstances testified to would not invalidate the verdict.

60. The court erred in ruling, in substance, that something more than a mere suspicion of misconduct on the part of a bailiff or a stranger is necessary in order to warrant the setting aside of a verdict.

61. The court erred in ruling that the interruption by the court of and comment upon the final argument of the defendant's counsel where the court stated that a certain portion of said argument was "far-fetched" was not a cause for granting a new trial.

63. The court erred in refusing to allow the defendant's exceptions taken in connection with the first motion for a new trial.

64. The court erred in ruling that the evidence contained

in the affidavits of Spencer, Messenger, and Downey, filed in support of the motion for a new trial on the ground of newly discovered evidence, and which tended to show in substance that, under the conditions existing on the night of the murder, it was impossible for one standing at the wheel, as the witness Brown said he stood, to see anything in the after-cabin, was cumulative evidence.

65. The court erred, in disposing of said last-named motion, in ruling that the facts show laches on the part of the defendant or his counsel in not being prepared with the evidence of the facts contained in said affidavits at the trial.

66. The court erred in refusing to allow the exceptions taken by the defendant at the conclusion of the opinion upon the motion for a new trial upon the ground of newly discovered evidence.

67. The court erred in its conclusions of law that the second motion for a new trial "must be overruled."

Argument.

Points Preliminary to the Trial.

I.

1. *The indictment was invalid* (Ass'ts 1, 2, 3) *because one of the grand jurors who found and returned it, was permitted to affirm instead of being sworn, without stating and without being asked as to the fact that he was conscientiously scrupulous of being sworn.* (*Tr. pp.* 3, 31.)

The statute of Massachusetts (Pub. St. c. 213, sec. 6) provides that —

"When a person returned as grand juror is conscien-

> tiously scrupulous of taking the oath before prescribed, he shall be allowed to make affirmation, substituting the word 'affirm' instead of the word 'swear,' and also the words, 'This you do under the pains and penalties of perjury,' instead of the words, 'So help you God.'"

This is, in Massachusetts, the "affirmation in judicial form" required by Rev. St. U.S. c. 1, sec. 1 (see Rev. St. U.S. sec. 800), and is, we contend, to be substituted for the oath only when the juror is conscientiously scrupulous of taking an oath. It contemplates inquiry of the juror who refuses the oath to ascertain if he is so conscientiously scrupulous. Just how far the investigation of his conscience shall be carried may not be clear, but there should at least appear to be some reason other than his unexplained refusal to justify the substitution. The phraseology of the statute cannot be construed as equivalent to "When a grand juror *declines* to take the oath," etc. The words "conscientiously scrupulous" are pregnant words, and it is clearly the intent of the statute that an affirmation shall not be resorted to merely to evade the moral restraint of an oath. It may well be that the grand juror's own statement that he has conscientious scruples against swearing — just as the statement of a petit juror upon his *voir dire*, in a capital case, that he has conscientious scruples against capital punishment — must ordinarily be taken to be final upon the question of his qualification, but he must at least make his statement as a foundation in both cases. If he does so, there then exists evidence upon which the presiding judge may find the fact, although it would even then be clearly competent for the court, upon further investigation, to disbelieve him, and to refuse to allow him

to affirm. If he does *not* make the statement, there is nothing to justify the court in permitting the substitution for the oath of the less solemn and religious asseveration. That such an inquiry would not always be truthfully answered is hardly a sufficient objection to our contention. In any event, it is one which, we submit, the spirit of the statute requires to be made. In the case at bar it does not appear that the grand juror Merrill was inquired of as to this point, or that he was conscientiously scrupulous of taking an oath, or made any statement in regard to it except that he "affirmed and declined to take an oath." (Tr. p. 31.)

2. *If Merrill did make "affirmation in judicial form" in accordance with the statute of the United States and of Massachusetts, then the indictment should have been presented upon the oath* and affirmation *of the grand jurors.*

The St. 3 & 4 Wm. 4, c. 49, sec. 1, enacted —

> "That every person of the persuasion of the people called Quakers, and every Moravian, be permitted to make his or her solemn affirmation or declaration instead of taking an oath in all places and for all purposes whatsoever where an oath is or shall be required, either by the common law or by any act of Parliament already made or hereafter to be made, which said affirmation or declaration shall be of the same force and effect as if he or she had taken an oath in the usual form."

Pursuant to this statute, Mr. Baron ALDERSON, at the Worcester assizes of 1839, when the grand jury was called and it appeared that one of them was a member of the

Society of Friends and made affirmation, directed that all indictments should commence, —

> "The jurors for our Lady the Queen upon their *oath and affirmation* present that &c."
>
> 9 C. & P., 78.

See, also, —

> *Rex* v. *Dann*, 1 Moody Crown Cases, 424.
> *Commonwealth* v. *Fisher*, 7 Gray, 492.
> *State* v. *Harris*, 7 N.J. L., 361.
> *Same* v. *Gibbons*, 4 N.J. L., 40–46.
> *Same* v. *Fox*, 9 N.J. L., 244.
> *Same* v. *Price*, 11 N.J. L., 203.
> 3 Burns Justice, 16.
> Whar. Cr. Pl. & Pr., sec. 95.

If any of the jurors affirm, the defendant is fairly entitled to notice of the fact on the face of the indictment, that he may inquire, should he wish to do so, whether or not the person so affirming was entitled to affirm within the meaning of the statute; for, if not, the indictment found against him would be void.

II.

1. *The array was illegal* (Ass'ts 6–9) *because, whereas the court, on November* 17, 1896 (*Tr. p.* 13), *had ordered that special venires should issue for one hundred additional petit jurors to come in on Monday, the* 14*th day of December*, 1896 (*the day assigned for the trial of this case to begin*), *of whom fourteen were ordered to be brought in from the city of Cambridge, the United States marshal*

did not comply with said order, but, in disregard thereof, returned only eighty-six men, none of whom were from the city of Cambridge. (*Tr. p.* 14.)

Section 802 of the Revised Statutes provides that jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services. Pursuant to this section, and for the purposes therein enumerated, the court had made an order (of November 17) for the bringing in, for the trial of this case, by special venires, of one hundred additional petit jurors from certain towns and cities therein named, including fourteen from the city of Cambridge. This list was thereby judicially declared to constitute that apportionment which was "most favorable to an impartial trial," etc. The venire was not served upon the city of Cambridge, and, in disregard of this order of the court, no jurors were returned from there. (See affidavits of Brandon, Tr. pp. 38, 39.) In other words, the marshal failed to bring in the list of jurors which the court had by its order, pursuant to the statute, declared to be "most favorable to an impartial trial." Of a consequence, the jurors whom he did return *were not* most favorable to an impartial trial, and the defendant was thereby prejudiced. No stronger argument upon this point can be found in the books than the learned and exhaustive discussion of the question by Lord DENMAN, before the House of Lords, in *O'Connell* v. *The Queen*, 11 Cl. & Fin. 155 (at pages 351 *et seq.*). The facts, so far as they relate to this objection to the array, were closely like those of the case at bar. In the O'Connor case, fifty-nine names had been

omitted from the list of jurors of the county of the city of Dublin. It is true that the omission was there alleged to have been fraudulent, but, as will be seen, the element of fraud does not enter into the reasoning of the learned judge. "If it is possible," said he, "that such a practice as that which has taken place in the present instance, should be allowed to pass without a remedy (and no other remedy has been suggested), trial by jury itself, instead of being a security to persons who are accused, will be a delusion, a mockery and a snare. The traversers challenged the array on account of the fraudulent omission of fifty-nine names from the list of jurors of the county of the city of Dublin. The attorney-general demurs to that challenge, admitting thereby that that fact has taken place. It appears to me that that challenge ought to have been allowed. . . . I think [p. 352] that the principle of challenge to the array is not confined to the narrow issue whether the sheriff has done wrong, but involves that larger question whether the party has had the security of a trial by a lawful jury of his country."

In the same case Lord COLERIDGE is quoted by Lord DENMAN (p. 353) as saying, in a written opinion rendered by him, —

> "It seems to me that all questions touching the formation of juries must be examined by the judges with very critical eyes."

Lord DENMAN continues (p. 357) as follows: —

> "The ground of challenge to this array was, that after the recorder had exercised his judicial functions, after he had determined, 'This shall be the list for

the county of the city of Dublin for the ensuing year,' somebody else had said, 'This shall not be the list; that is the list, and that shall be taken and that shall become the jurors' book.' The handing over the perfect list by the recorder to the sheriff is a ministerial act, but that ministerial act has been imperfectly, or rather, not at all, performed. The challengers say, you have deprived your own judicial act, which has been properly performed, of the weight of authority to which it was entitled. You, yourself, have handed over a list which has made the book imperfect and therefore we contend that that is no book. . . . Is it not right [p. 361] to hold the public officer to the strict and faithful discharge of his easy duty? Can anything be more wrong than that he should enjoy full license to tamper with these sacred documents according to his pleasure? In that short passage [pp. 362, 363] in Lord COKE, which contains the whole of the learning upon this subject (Co. Litt. 156) he cites a case from the Year Books, which is twice reported. . . . The sheriff returned a list which the bailiff of the franchise ought to have returned; that was held to be wrong *prima facie* because it deprived the party of his challenge against the bailiff individually, but then it was argued, 'Oh, but there are good names enough returned by the sheriff to insure the party a fair trial:' exactly the argument which appears to have succeeded in Dublin. But the Court held . . . that as the array was one entire indivisible thing, one error would vitiate the whole, and the whole was accordingly set aside. *In that very case the sheriff was charged with unindifferency; the question of his unindifferency was tried, he*

was acquitted upon that charge; and yet the fact of his having done, though not with any corrupt or partial intention, that which gave a different jury, was deemed a default sufficient to set aside the whole proceedings [p. 363]."

As has already been suggested, it appeared in the case cited that there was an omission of 59 names out of 700. This, Lord DENMAN observed, seemed to him to be a great proportion. (It was still greater in the case at bar.) He goes on to say in this connection (p. 365), "It is obviously by no means impossible that, if those 59 names had appeared in the panel, the whole jury might have been drawn from those names; and who can tell me that the effect of the evidence upon the minds of the jury might not have been entirely different if they had consisted of those gentlemen? That, however, is a subject upon which I think I am not at liberty to enter. *I consider that it cannot be incumbent upon any person to prove any other particular injury, than simply and solely that one of Her Majesty's subjects, put upon his trial, has not had the security which is provided for him by law that that trial shall be a fair one.*"

In the same case, Lord CAMPBELL, in the course of his opinion (p. 411) says, "I entertain little doubt that the challenge ought to have been allowed." The judgment of the court below was reversed.

See —

McQueen v. *State*, 10 So. (Ala.) 433; (s.c.) 94 Ala. 50.

Darby v. *State*, 92 Ala., 9.

State v. *Jenkins*, 32, Kan., at pages 477, 479.

2. *The order of Judge* ALDRICH *of December 7th (Tr. p. 14) was a still further interference with the order of November 17th (Tr. p. 13), an infringement of the statute, and a violation of the defendant's rights,* —

because the addition of the fourteen jurors therein named to the jurors returned under the special venires ordered November 17th, materially altered the apportionment from the various cities and towns named in the table designated by the court. (Tr. pp. 13, 15.) The coincidence between the number of the regular-term jurors included in the order of Judge ALDRICH, and the number which, under the special venire for this trial, was to be drawn from Cambridge, indicates that somebody knew, as early as December 7th, that the Cambridge jurors were not to be summoned. In this connection, see affidavits of Brandon. (Tr. pp. 38, 39.) The defendant was not present when this order was made. (Tr. p. 125.)

In *Nealon* v. *People*, 39 Ill. Ap., 481, it was held that neglect by a county court to conform to the provisions of the Illinois Revised Statutes, c. 78, secs. 1 and 2, namely, to select from the original list a sub-list, as required, was sufficient ground for a challenge to the array. In this case the court, by CONGER, P.J., well says (p. 485), —

> "If, in all cases, an accused person, who has unsuccessfully challenged the array of jurors, must before he can successfully assign error upon the action of the court in overruling his challenge, show that some positive injury has been done him by the failure or irregularity, then any of the provisions of the jury law might be violated, and the accused could not be heard to complain. . . . It is the right of an accused to

have a jury selected in compliance with the law, and any substantial and material departure from the methods pointed out by the statute is certainly a wrong to him of which he has a right to complain."

The sections of the Illinois statute referred to are as follows: —

SEC. 1. "Be it enacted by the people of the state of Illinois, represented in the General Assembly, that the county board of each county shall, at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purposes of this act, make a list of a sufficient number, not less than one tenth of the legal voters of each town or precinct in the county, giving the place of residence of each name on the list, to be known as the jury list.

SEC. 2. "At the meeting of the county board in the respective counties in this state, in September, in the year 1874, and in each year thereafter, such board shall select from such list a number of persons equal to one hundred for each trial term of the circuit and other courts of record, except county courts, which may be provided by law to be held during the succeeding year, and in the county of Cook, two hundred for each term of the circuit and superior courts of Cook county, and one hundred for the criminal court of Cook county for each trial term to serve as petit jurors: *Provided* that the persons selected to serve as jurors in courts of record having jurisdiction only in and for cities, shall be selected from four of the most convenient towns to said court, to be designated by the judge of such court, and the county clerks of

the county notified thereof before the first day of September next: and in making such selection shall choose a proportionate number from the residents of each town or precinct, and shall take the names of such only as are;

"*First.* Inhabitants of the town or precinct not exempt from serving on juries.

"*Second.* Of the age of twenty-one years or upwards, and under sixty years old.

"*Third.* In the possession of their natural faculties and not infirm or decrepit.

"*Fourth.* Free from all legal exceptions, of fair character, of approved integrity, of sound judgment, well informed, and who understand the English language."

III.

The array was illegal, further (Ass't 9), *because the subordinate venires were not served in the manner prescribed by section* 803 *of the Revised Statutes, namely, by the marshal in person or by his deputy.*

The subordinate venires were severally directed to the constables of the respective cities and towns named in the table referred to in the order of the court of November 17, 1896. (Tr. pp. 13, 14.) This was clearly a failure to comply with the law regulating the manner in which jurors shall be summoned. The officers designated by the statute are persons who are responsible to and under the control of the Federal government, for the performance of a specified duty. Local constables are not so responsible, and service by them was in violation of the explicit provisions of the law.

In *Durrah* v. *The State*, 44 Miss. 789, the court, at page 796, speaking of the causes for which the array may be quashed, says, "It must be either for some misconduct in the officer which would be fraudulent, or it must be founded on some manifest error committed in selecting, drawing or summoning the jurors by not pursuing the law."

This statute, as well as section 802, is mandatory, and must be construed strictly. A failure to comply with either is ground for reversal.

Thompson & Merriam on Juries (ed. 1882) p. 79.
United States v. *Woodruff*, 4 McLean, 105.
Hall v. *Com.*, 80 Va., 555-560 (1865).
Richards v. *Com.*, 81 Va., 110 (1885).
Harrison v. *State*, 3 Tex. App., 558.
Hunter v. *State*, 31 S.W. Rep., 674 (Texas, 1895); 34 Tex. Cr. Rep., 599.
Posey v. *State*, 73 Ala., 490.
Brazier v. *State*, 44 Ala., 387 at page 392.
People v. *McKay*, 18 Johns., 212 (at page 217).
Wells v. *State*, 94 Ala., 1.

In *People* v. *McKay*, 18 Johns., 212 (at page 217), SPENCER, C.J., says,—

> "A sheriff's return of the manner in which he has performed his duty must be made on this process [the venire] that the Court may be officially informed that the sheriff has duly obeyed its mandate. Inasmuch then as a venire was necessary at the common law and as the statute yet requires it to be issued, the omission to issue it we must consider an error apparent on the record: and in such a case, affecting life, we do not feel ourselves authorized to dispense with a process

required by the common law and also by the statute, although we may not be able to perceive much use in continuing it. . . . *It is a humane principle applicable to criminal cases and especially when life is in question, to consider the prisoner as standing upon all his rights and waiving nothing on the score of irregularity.*"

We are aware that there are cases and *dicta* in some jurisdictions which seem to approve a contrary doctrine as to the service of venires, but this court has never so held, and we submit that the principle for which we contend is based upon sound reasoning and the weight of authority.

Is it not more just and reasonable to hold judicial and ministerial officers to "a strict and faithful discharge of their easy duty" explicity defined by statute and mandate, than to say, "It is true the statutes and the order of the court were not complied with, yet it is not apparent that the defendant was thereby injured"? We submit that the language of Baron DENMAN, and of Judges CONGER and SPENCER, already quoted, decisively answers this question.

Points During the Trial.

I.

The court should not have permitted the detective, Power, to testify (Tr. p. 43) as to the conversation between himself and the defendant at Halifax, while the defendant was in custody, under the circumstances disclosed by the testimony. (Ass't 14.)

The defendant was brought to Halifax in irons, and there kept in confinement. While thus in custody, he was

taken before one Power, a local official detective, who searched him and talked with him. (Tr. p. 23.) Power testified (Tr. p. 42) that he made an examination of the defendant in his (Power's) office, no one else being present; that no threats were made to the defendant nor inducements held out to him. The witness was then asked, "What did you say to him and he to you?" To this question the defendant's counsel objected, and was permitted to cross-examine the witness before the court ruled upon the objection. Upon this cross-examination the witness stated, in addition to the foregoing, that he (the witness) asked that the defendant should be brought to his office for the purpose of interviewing him; that he there stripped the defendant, and examined his clothing but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant was then in custody and did everything the witness directed him to do, etc. (Tr. p. 42.) One member of the court then asked the witness the leading questions which are found in the record. (Tr. p. 43.) Thereupon the defendant renewed his objection, assigning the reasons therefor. (Tr. p. 43.) The objection was overruled, and the defendant alleged an exception. The witness answered as follows: "When Mr. Bram came into my office, I said to him, 'Bram, we are trying to unravel this horrible mystery.' I said, 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder. He [the defendant] said, 'He could not have seen me; where was he?' I said, 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said, 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us

here think you could not have done all that crime alone. If you had an accomplice you should say so, and not have the blame of this horrible crime on your own shoulders.' He said, 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies."

That Power's testimony — notably the expression of his confident opinion of the defendant's guilt — was exceedingly damaging to the defendant is undeniable. We think it is equally undeniable that the alleged conversation took place under such circumstances as to render it incompetent as an inferential admission or confession; in other words, that it was not a free, voluntary, and spontaneous statement within the meaning of the decisions bearing upon testimony of this class. It can hardly be contended that it was a considerate or humane way to treat the prisoner. The purpose was to elicit evidence against him in support of the accusation made by Brown. The method adopted, so far as it may be gathered from what was said and done, was very like browbeating. The attitude of the officer was that of one with absolute authority over the person and property of the prisoner; he took extraordinary liberties with him, and whatever he ordered the prisoner did without question. (Tr. p. 42.) Again, his attitude was that of one who had prejudged the prisoner, upon the statement (apparently uncorroborated) of one who was himself in custody under suspicion of the same offence. The language used was of a kind from which the tone may be easily inferred, and, we submit, in spite of the witness' statement, elicited by the court, that no threats nor inducements were made or held out, and that what was said by Bram was entirely voluntary and uninfluenced by the witness, contains both covert threats and covert inducements.

Fairly interpreted, Power's acts and language were equivalent to the following: "Bram, I've got you here, and you must do as I say. You are in a pretty tight position, and it will be well for you to tell the truth. Brown says you killed the captain, and I am positive that you did. It's no use for you to say you didn't. But some of us think you're not the only one that had a hand in it. If you didn't do it alone, it will be better for you to say so," etc. The whole aim and purpose of the examination and interview was to intimidate the prisoner and induce him to say something which would tend to incriminate him. In the interest of fairness and public justice, such inquisitorial methods should not be countenanced. They are not consistent with the principle of fair play. Testimony of this sort should be admitted with the greater caution when the prisoner and detective are alone.

There must be no direct or implied inducement, however slight, and no exertion of any improper influence.

3 Am. & Eng. Enc. of Law, 449, and cases cited.
Ibid. 464, and note 1.

And where an express denial is made of any inducement or threat, it will avail nothing if afterwards, upon receiving the testimony, it appears that inducements were held out or threats made, or that the prisoner was in any way improperly influenced.

Com. v. *Taylor*, 5 Cush., 605.
State v. *Patterson*, 73 Mo., 695 (706).

Since the decisions in *Reg.* v. *Drew*, 8 C. & P., 140, and *Same* v. *Morton*, 2 Moo. & R., 514, the English law

upon this subject has undergone considerable change, and the doctrine in England is now to be found in *Reg.* v. *Garner*, 1 Denn. C.C., 329; in *Reg.* v. *Fennell*, L.R., 7 Q.B. Div., 147; and in *Reg.* v. *Mansfield*, 14 Cox, C.C., 639.

In *Reg.* v. *Garner*, *supra*, the alleged confession was not made in the presence of any person having official authority. The inducement was merely that it would be better for the prisoner to tell the truth. It was nevertheless held inadmissible.

In *Reg.* v. *Fennell*, *supra*, the prisoner was taken into a room with the prosecutor and a police inspector. The prosecutor then said to him, "He [meaning the inspector] tells me you are making house-breaking implements; if that is so you had better tell the truth, it may be better for you." The court held that the confession which was thereupon made was inadmissible.

In *State* v. *Dildy*, 72 Nor. C., 325, the defendant was charged with murder, and a witness for the state testified that he was one of the party that went out to arrest the prisoner on the day of the homicide, that he and two others came up to the prisoner. They had arms in their hands, but did not present them at the prisoner. They did not inform him that they had come to arrest him. The prisoner did not appear to be at all frightened. The witness asked the prisoner, "What made you kill Charles Goy?" The prisoner then inquired of the witness, "Is he dead?" To this the witness replied, "You ought to know he is dead when you killed him." The witness then stated that the prisoner then and there confessed that he shot the deceased, saying that he thought to shoot him in the legs, but did not intend to kill him. The court held that the con-

fession under these circumstances was not voluntary and was inadmissible.

In *Kelly* v. *The State*, 72 Ala., 244, the language was very much like that in the case at bar. The officer said to the prisoner, "You have got your foot in it, and somebody else was with you. Now if you did break open the door the best thing you can do is to tell all about it, and to tell who was with you and to tell the truth, the whole truth and nothing but the truth." The court says, "The exhortation to the prisoner did not stop with adjuring him to tell the truth, or only with telling him that the best thing he could do was to tell all about it, in the event he was guilty of the breaking. It goes further, by assuming his guilt and by assuming also that the prisoner was accompanied by one or more accomplices; and he was told in effect, that it would be best for him to tell all about these assumed facts. The manifest impression produced on the prisoner's mind must have been that he would, in some unknown manner, fare better by confessing his guilt of the crime of burglary; and this inducement vitiates any confession evoked under its influence."

In the case at bar there was the same assumption of guilt; the same assumption that there was an accomplice; the same suggestion that it would be better for the prisoner to tell the truth: but there was also the further and more significant suggestion that he ought to tell the truth so that he might not have the blame (either legal or moral) of this horrible crime on his own shoulders. To be sure, this last inducement did not elicit a confession in terms. The immediate answer was not responsive, but it was not an express, emphatic, and indignant denial; it was a reply which, it might fairly be argued, an innocent man would not have made. It might be construed as a guarded an-

swer, indicating the accomplice inquired about, without express implication of the speaker's own guilt. The conversation as a whole, it might be contended, could hardly be explained upon any theory consistent with the innocence of the accused.

If the prisoner made answers which could fairly be regarded as admissions or indications of guilt, and those answers were prompted by fear or inducement due to the circumstances in which he was placed, and to the language and attitude of the officer, such answers are, we submit, as inadmissible as a confession in terms.

In *Sparf* v. *United States*, 156 U.S., 343, the trial court instructed the jury that they should act on evidence of this character with great caution; that if it was induced by promises of hope or fear, it must be carefully considered; that the jury was to consider the condition of the defendant and the witnesses at the time the alleged admissions were made; that the jury was to consider the fact that the defendant was charged with crime; that they were to determine whether the confession was voluntary or whether any inducement was held out by anybody. This court approved that instruction. Mr. Justice HARLAN said, —

> "It is true that the fact of a prisoner being in custody at the time he makes his confession is a circumstance not to be overlooked, because it bears upon the enquiry whether the confession was voluntarily made or was extorted by threats of violence, or made under influence of fear; but confinement or imprisonment is not of itself enough to justify the exclusion of a confession if it appears to have been voluntary and not obtained by putting the prisoner in fear, or by promises."

In *Hopt* v. *Utah*, 110 U.S., 574, there was evidence that the prisoner made a confession or admissions to a police officer, but there was no evidence that the police officer said anything to the prisoner. There was no evidence of any inducement or fear other than that the defendant was under arrest. In dealing with the question raised in that case, Mr. Justice HARLAN said, at page 583, —

> "The admissibility of such evidence so largely depends upon the special circumstances connected with the confession, that it is difficult, if not impossible, to formulate a rule that will comprehend all cases. As the question is necessarily addressed, in the first instance, to the judge, and since his discretion must be controlled by all the attendant circumstances, the courts have wisely forborne to mark with absolute precision the limits of admission and exclusion."

See *Com.* v. *Nott*, 135 Mass., 269, at page 272.

If the court deems it proper to refer to the transcript of the testimony sent up at the defendant's request, it will be seen that, in the case at bar, no instructions were given to the jury upon the effect of this evidence.

II.

The court should have permitted the defendant in the cross-examination of Power, and for the purpose of showing interest, to ask him, "What other articles belonging to the defendant did you take possession of at that time?" (Tr. p. 44, Ass't 15.)

On cross-examination, Power testified that, at the interview with the defendant heretofore referred to, he took

possession of a pair of suspenders belonging to the defendant, and kept them in his office until the prisoners were to come to Boston, when he handed them over to the Halifax superintendent of police, and they were sent to Boston with other property of the defendant. The defendant's counsel then asked him the question contained in assignment 15.

The damaging effect of Power's testimony has already been alluded to, and is apparent. It became, therefore, very important that the defendant should, if he could in any legitimate way, break the force of it by showing the presence, in the witness' mind, of any undue interest in the defendant's conviction. This might be indicated by improper zeal exhibited in his treatment of the prisoner during the interview in question; it might be shown by the taking from the prisoner of articles of value which were never returned; it might further be shown by the taking of something which would have furnished evidence for the prisoner and by suppressing it to his consequent detriment. In any of these aspects, the question excluded was fairly directed to the discovery of bias or interest on the part of the witness.

The principle for which we are here contending is well stated by Mr. Justice PECKHAM in —

> *Tla-Kloo-Yet-Lee* v. *United States*, 167 U.S., 274.
> *Willis* v. *Russell*, 100 U.S., 621.
> *Gilman* v. *Higley*, 110 U.S., 47–50.
> *Com.* v. *Yotsing*, 7 Kulp. (Pa.), at page 355.

The question was admissible, also, by virtue of the rule that when one party elicits a portion of what was said and

done at a certain interview, or in a certain connection, the other party may ask for the whole, and give his version of it.

Power's *treatment* of the prisoner had quite as important a bearing upon the character of the interview as his language, and was just as much a part of the interview. The learned judge erred in preventing the defendant's counsel from pursuing this line of inquiry, and ruling that it was not proper cross-examination. (Tr. p. 44.)

In this connection we invoke the rule that, —

> "While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party."
>
> HARLAN, J., in *Vicksburg & M. R.R. Co.* v. *O'Brien*, 119 U.S., 101.

III.

The court should not have permitted the United States attorney, on the government's case in chief, to ask the sailors Anderson, Loheac, Slice, Perdok, and Wassen, the hypothetical questions set out in assignments 16 *to* 21, *inclusive.*

These questions differed from each other only slightly in form, and were all for the purpose of showing what would happen to the vessel, assuming the conditions existing on the night of the murders, if the sailor steering her should leave the wheel. The question asked Ander-

son (Assignment 16), "If the vessel is on the starboard tack and under full sail and the sheet is eased off and the wind coming a point or two aft on the starboard quarter, and you take your hand off the wheel, what would happen to her?" and the question asked Perdok (Assignment 20), "Now what effect would it have on that vessel under these conditions if you lashed that wheel?" — may be referred to in the argument of this point.

The only purposes for which it could be claimed that this evidence was introduced were, —

First, to corroborate Brown, the principal government witness (Tr. p. 121), who said (Tr. p. 118) that he stood with both hands on the wheel during all the time between 12 and 2 o'clock, and, consequently, when the murders were committed; or —

Second, to anticipate the theory of the defence, which, up to that time had not been suggested (Tr. p. 46), that Brown had equal opportunity with the defendant to commit the murders, and was in fact the murderer. For either of these purposes the testimony was inadmissible. Brown had testified for the government (Tr. pp. 23, 118) that while at the wheel he looked in at the window of the after-cabin and saw the defendant strike the captain. It was clearly incompetent to support the probability of this story, before it was controverted, by undertaking to show that, unless somebody had been at the wheel all the time, the vessel would have either fallen off or come up to the wind to such an extent as to be noticeable by those on board, especially by those on deck.

In other words, it was no part of the government's case in chief to show that Brown, whom the defence had not yet attacked, could not have committed the murders, be-

cause he could not have left the wheel without being discovered. It is as if the government had said, "Here is Brown, who says he did not leave the wheel; but lest the jury should have some doubt about this (although it has not yet been contradicted), we propose to show by experts that his story is extremely probable and ought to be believed, because, if he had left the wheel, the effect upon the vessel must have made his absence at once apparent."

In *United States* v. *Holmes*, 1 Cliff., 98, CLIFFORD, J. (at page 105), says, —

> "No principle in the law of evidence is better settled than the one enunciated in the rule that testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it. . . . Tested by the circumstances under which the testimony was offered, it is clear it would have had no tendency to prove the issue, and in fact and truth could have had no other effect than to fortify the credit of the witness. . . . It cannot be maintained that testimony merely rebutting is admissible in anticipation of matters to be contradicted or explained. Such a rule would be a very inconvenient one, and finds no support in the decided cases or in the practice of the Federal courts."

IV.

Dr. Draper should not have been allowed to express an opinion as an expert as to whether a man standing at the hip of a recumbent person and striking blows on that person's head and forehead with an axe, would necessarily be spattered or covered with some of the blood. (Ass't 22.)

The pertinency of the question objected to is made clear by the record. No appreciable interval had elapsed after the murders were committed before Monks saw the defendant (Tr. p. 22), and he and the defendant remained constantly together until the crew were called after daybreak, except for the "brief time" when the defendant was in his room. (Tr. p. 22.) No spots of blood were ever observed on the defendant's person or clothing. This, it should be said, was equally true of everybody else on board. It was a part of the theory of the defence that no one could have committed the murders in the manner alleged without being so bespattered and soiled with blood as to be readily detected, unless he had had an opportunity to change his clothing and to wash himself before being seen, and that the defendant had no such opportunity. Dr. Draper's testimony was introduced for the purpose of breaking the force of this suggestion.

We contend that the testimony was inadmissible, because, —

First. Dr. Draper had never seen the bodies of the murdered persons, and could not express an opinion based upon his own observation of their condition; it was therefore not within the rule stated in —

Hopt v. *Utah*, 120 U.S., 430.

Second. The inquiry was not one for an expert. The answer did not require the application of any peculiar skill or scientific learning; the circumstances were all before the jury, any one of whom was as well qualified to form an opinion upon them as the witness. It was not a question in medicine, anatomy, or surgery, — although the object assumed to be cut was a human body, — but one merely of practical mechanics, *i.e.*, "In what direction will the particles of a body fly when the sharp edge of an axe is brought forcibly against and into it?" or "Could a person use an axe under the circumstances assumed in the question without being considerably spattered with blood?" It is to be observed that the sources from which the assailant might receive blood upon his person or clothing were twofold: that is, directly from the body struck, and also from the drippings of the axe. The question asked of Dr. Draper is not divided in accordance with this distinction, and must be taken to include both. If Dr. Draper's peculiar knowledge of the laws governing the circulation of blood in the human body gave him any advantage over the ordinary individual in possession of all the facts, — which we deny, — it is quite clear that such knowledge did not help him to express an opinion as to the amount of blood likely to come from off the axe to the person wielding it.

In *Brunker* v. *Cummins*, 133 Ind., 443, ELLIOTT, J., speaking for the court, said, —

> "It is safe to assume at the outset that, where the facts can be fully placed before the jury, opinion evidence even from experts, is incompetent, if the facts are of such a nature that jurors are as well qualified to form an opinion upon them as the witnesses."

See, also, *Railway Co.* v. *Kellogg*, 94 U.S., 469 (472).
Hopt v. *Utah*, *supra*.

Third. If the question was one for an expert, Dr. Draper was not qualified to answer it. As we have already suggested, the inquiry involved, in part, simple mechanics and, in part, common observation. If, however, peculiar skill were to be sought for the purpose of obtaining an opinion as to the direction in which the particles of a given substance, hewn with an axe, would fly, we submit that a woodcutter would be of far more assistance than a physician.

V.

The language of Judge WEBB *in the presence of the jury, during the cross-examination of the defendant, as to the loose sheets which the defendant had said were duplicates of the log, to wit, "He [the defendant] was making something to be used in evidence; a pure manufacture at that time" (Tr. p. 52), was a violation of the defendant's right to an impartial trial, and had a tendency to seriously prejudice him in the minds of the jury.* (Ass't 23.)

It is not easy to approach the discussion of this unfortunate episode without indignation, or to deal with it in a wholly unimpassioned manner. We can hardly conceive of anything more improper or more fatal to the prisoner's case than such comment under such circumstances. If a judge, "to whose lightest word the jury, properly enough, give a great weight" (SHIRAS, J., in *Hicks* v. *United States*, *infra*), charges the defendant on the witness stand, in language and in effect, with having manufactured evidence to be used to meet an anticipated accusation, the

only inference that can be drawn from the remark is, that, in the opinion of the court, the defendant is guilty. Evidence would not be "manufactured" under such circumstances by an innocent person. It is, we submit, almost as if the learned judge had turned to the jury and, with the prestige, dignity, and influence of his office to emphasize the statement, had said to them explicitly, "Gentlemen, the defendant is guilty of the offence charged in this indictment."

It is important to consider briefly the circumstances under which this remark was made: the witness was on trial for his life and under examination by opposing counsel. On his cross-examination he had testified (Tr. pp. 50 *et seq.*) that he made certain duplicate sheets from the log-book for the purpose, in case the vessel went off, of having the so-called duplicates on shore to show. The witness, also upon cross-examination, stated many differences between the original log and the so-called duplicates. Subsequently, during the cross-examination, and after the log-book and loose sheets had been put in evidence, the defendant was asked, —

> "*Q.* (By the United States attorney.) What was the course you were sailing?
>
> "*A.* For Cayenne.
>
> "*Q.* No; what was your course that you were sailing from the day before, through the night, and up to the time that you started for French Cayenne?
>
> "*A.* Well, just give me the log book and I will refer to it.
>
> "*Q.* No; can't you recollect that?
>
> "Defendant's Counsel. — I think he is entitled to the log book, your honors."

The district attorney then produced the log-book and had certain loose sheets of paper in his hand, being the so-called duplicates.

"The Defendant. — Let me take those [referring to the sheets the attorney held].

"District Attorney. — Well, you take the log book and determine from that.

"Witness. — Well, I think I am entitled to the whole thing that has any connection with this time.

"WEBB, J. — Your counsel will see that you have your rights. If you want anything, you may have it if it is proper. If you ask for those sheets, you are not entitled to them in reply to that question.

"Defendant's Attorney. — If they will enable the witness to refresh his recollection, if your honor please, a memorandum made by him in reference to this same matter —

"WEBB, J. — Mr. Cotter, this witness has testified that he, day by day or habitually, entered in his log book proper memoranda, or notations, he called them, of the progress of the ship on the voyage.

"Mr. COTTER. — Yes, your honor.

"WEBB, J. — But after he got about on the other course, several days after, he took it into his head that the ship when she sailed from whatever port she might make might carry away that log book, and undertook to make what he called a duplicate.

"Mr. COTTER. — Yes, your honor.

"WEBB, J. — And the evidence this morning shows it is not by any means a copy. He was making something to be used as evidence, a pure manufacture at that time.

"Mr. COTTER. — It appears, however, that that was made from something else than this log book.

"WEBB, J. — Well, now he is asking him about this log book, to give the ship's position.

"Mr. COTTER. — That he copied from this log book, and we submit that he is entitled to that, your honor."

The stenographer read the question, *i.e.*, —

"*Q.* What was the course you were sailing?

"Witness. — For Cayenne.

"*Q.* No; what was the course you were sailing from the day before, the night, and up to the time that you started for French Cayenne?"

The case then proceeded.

"District Attorney. — Now, I would like to have him answer.

"One of the Court. — Do you object, Mr. Cotter? I saw you rise.

"Mr. COTTER. — I would like to have the reporter read the last two or three questions."

The stenographer read the question again, and, at Mr. Cotter's request, read what took place between himself and Judge WEBB, up to and including the words by the judge:

"And the evidence this morning shows it is not by any means a copy. He was making something to be used as evidence, a pure manufacture at that time.

"Mr. COTTER. — That statement, your honor, we object to. We take exception to your honor's statement that it was a pure manufacture.

"WEBB, J. — I didn't say anything about a 'pure manufacture.'

"The stenographer. — I so understood it, your honor.

"WEBB, J. — Well, strike it out; strike out all that I have said. Every remark I made may be stricken out."

The exception to this language was alleged before a new question was asked the witness, and as soon as one member of the court saw the defendant's counsel rise for the purpose of claiming it. At the conclusion of the colloquy between the defendant's counsel and Judge WEBB, the former, with the permission of the court, to avoid any misunderstanding, asked the stenographer to read what was said pending the objection to the question propounded by the United States attorney, and, immediately at the conclusion of the reading, counsel objected and excepted to the remarks of the judge. (Tr. p. 52.) The defendant did all that it was possible for him to do.

We do not know of any rule of the Federal courts which makes it necessary, in order to save an exception, that the court should expressly reserve it.

Sheppard v. *Wilson*, 6 How., 260 (275).

But even if no exception had been alleged, we submit that the injury caused the defendant by the remark is so evident that this Court would not refuse to consider it.

Storm v. *United States*, 94 U.S., 76.
Suydam v. *Williamson*, 20 How., 427 (433).

It may be argued that the subsequent disavowal and withdrawal of the remark cured the error, but we submit

that the language was of such a character that no withdrawal, however prompt and emphatic, could have obliterated, or even modified, its effect. One might as well attempt to heal a wound by withdrawing the dagger. It was irrevocable and incurable, and its effect under the circumstances, coming from such a source, supported by the weight and dignity of the speaker's office, was incalculable.

It may be argued, further, that the error was obviated by the following language in the judge's charge, between which and the remark in question several days had elapsed: —

> "You are now approaching that part of this proceeding where the sole responsibility rests upon yourselves. You have heard the evidence, under such directions as the court has given with regard to its admissibility; you have seen the witnesses; you have heard the arguments of counsel upon both sides. But you are to remember that testimony, to analyze it, to weigh it, to compare its different parts together to determine for yourselves what the evidence establishes to your minds, and act upon it. You are not to be governed by the arguments of counsel beyond that degree to which they commend themselves to your own understanding and your own intelligence. You are not to be affected by any admissions or statements made by counsel in opening or closing, but you are to be governed by the evidence and the law. You are not to be affected by any supposed indication of an opinion of the court, or if an opinion had been directly expressed to you by the court, you would have no authority to accept it in substitution for your own inde-

pendent, original, careful determination on the matters yourselves. . . . But you are the final arbiters of the evidence and of the fact under the law as the court shall give it to you." (Tr. p. 59.)

Such language in the charge does not cure the error.

Mr. Chief Justice FULLER, in —

Allison v. *United States*, 160 U.S., 203, at page 210, says, —

"In our opinion, the liability of the jury to thus understand these observations was so great that their utterance constitutes reversible error. *Nor was this error obviated by what the judge said in his charge to the jury.* . . .

"If this [part of the charge] could be, in any aspect, treated as a modification of the previous assertions of the court, it was too far separated from that connection to permit us to attribute that operation to it."

And again, this court has recently disapproved of such utterances by the trial court, in the following explicit language: —

. . . "Such denunciation of the testimony of an accused is without legal warrant. *Allison* v. *United States*, 160 U.S. 203. Indeed, this instruction, besides giving rise to this error, was also, if possible, more markedly wrong from the implications which it conveyed to the jury. . . . In *Starr* v. *United States*, 153 U.S. 626, speaking through Mr. Chief Justice FULLER, this court called attention to the fact that there were limitations on the power of the Federal court, in commenting on the facts of a case, when

> instructing a jury, limitations inherent in and implied from the very nature of the judicial office. In *Reynolds* v. *United States*, 98 U.S. 168, speaking through Mr. Chief Justice WAITE, this court said also on the same subject: 'Every appeal by the court to the passions or the prejudices of a jury should be promptly rebuked and . . . it is the imperative duty of a reviewing court to take care that wrong is not done in this way.'"
>
> WHITE, J., *Hickory* v. *United States*, 160 U.S., 425.

We concede that Judge WEBB may not have realized the full significance of his remark. His disavowal of the language used indicated that he uttered it without reflection, and was, perhaps, conscious of its impropriety.

The opinion of Mr. Chief Justice FULLER in *Starr* v. *United States*, 153 U.S., 624, is peculiarly applicable to the case at bar:

> "We are not insensible to the consideration that the learned judge probably did not intend that his words should bear so sweeping a signification. . . .
>
> "We are compelled to add some further observations in relation to the charge before us.
>
> "It is true that in the Federal courts, the rule that obtains is similar to that in the English courts, and the presiding judge may, if in his discretion he think proper, sum up the facts to the jury: *and if no rule of law is incorrectly stated*, and the matters of facts are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the facts is not reviewable on error. . . . But

he should take care to separate the law from the facts and to leave the latter in unequivocal terms to the judgment of the jury as their true and peculiar province. *M'Lanahan* v. *Universal Ins. Co.*, 26 U.S. (1 Pet.) 170 (182). As the jurors are the triers of facts, expressions of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand that the instruction is not given as to a point of *law by which they are to be governed*, but as a mere opinion as to the facts to which they should give no more weight than it was entitled to. . . . The same rule prevails in the courts of many of the states, and in the charge in *Com.* v. *Selfridge*, referred to by the court below, these views were expressed upon the subject: 'As to the evidence, I have no intention to guide or interfere with its just and natural operation upon your minds. I hold it the privilege of the jury to ascertain the facts, and that of the court to declare the law, to be distinct and independent. Should I interfere, with my opinion, with the testimony in order to influence your minds to incline either way, I should certainly step out of the province of the judge into that of an advocate. All that I can see necessary and proper for me to do in this part of the cause, is to call your attention to the points or facts on which the cause may turn, state the prominent testimony in the case which may tend to establish or disprove these points, give you some rules by which you are to weigh the testimony, if a contrariety should have occurred, and leave you to form a decision according to your best judgment, without giving you to understand if it can be avoided,

what my own opinion of the subject is. Where the inquiry is merely into matters of fact, or where the facts and law can be clearly discriminated, I should always wish the jury to leave the stand without being able to ascertain what the opinion of the court as to those facts may be, that their minds may be left entirely unprejudiced to weigh the testimony and settle the merits of the case.'

"So the Supreme Court of Pennsylvania says: 'When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him; deductions and theories, not warranted by the evidence should be studiously avoided. They can hardly fail to mislead the jury and work injustice.' *Burke* v. *Maxwell*, 81 Pa. 139, 153. See, also, 2 Thomp. Trials, Secs. 2293, 2294.

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling. *Hicks* v. *United States*, 150 U.S., 452. . . . The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree and that indignation was expressed in terms which were not consistent with

due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances. . . . Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which and the manner in which the administration of justice should be conducted are the same everywhere, and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them."

It was for the jury to determine what weight was to be given to the testimony of the accused. The remarks of Judge WEBB to counsel, in the presence of the jury, were prejudicial error.

People v. *Mino*, 149 N.Y. Ct. App., 324.
Com. v. *Foran*, 110 Mass., 179.

"It must be remembered that men may testify truthfully, although their lives hang in the balance and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one, if the judge, to whose lightest word the jury properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall at his own request, but not otherwise, be a competent witness.' The policy of this enactment should not be defeated by hostile comments of the trial judge,

whose duty it is to give reasonable effect and force to the law."

SHIRAS, J., *Hicks* v. *United States*, 150 U.S., 452.

The language of Judge WEBB, set forth in the assignment in the case at bar, was unwarranted, and most damaging to the accused, and was not made less so by the fact that, on exception taken, he attempted to disavow it, and then ordered the stenographer to strike it out. This was apparently done to nullify the defendant's exception.

Error is not always cured by withdrawal of or striking out objectionable declaration by the court.

As was said by WHITE, J., in *Waldron* v. *Waldron*, 156 U.S., p. 361, at page 383, —

"There is an exception, however [to the rule that an attempted correction by the court will cure the error], to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature, that it must have affected the minds of the jury despite the correction by the court. The rule and its exceptions were considered in *Hopt* v. *Utah*, 120 U.S., 430, where the foregoing authorities were cited, and the principle was thus stated by Mr. Justice FIELD: 'But independently of this consideration as to the admissibility of the evidence, if it was erroneously admitted, its subsequent withdrawal from the case, with its accompanying instruction, cured the error. It is true that in some

instances there may be such strong impression made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the original objection may avail on appeal or writ of error, but such instances are exceptional.'"

VI.

The court should have permitted the defendant, for the purpose of fully stating and explaining what had occurred at a certain interview between himself and Captain Nash, at the time of his shipment, as to which he was examined by the United States attorney, to introduce certain letters of recommendation from the defendant's former employers, which, the defendant testified (Tr. p. 53) he showed to Captain Nash.

It is a principle of evidence too well settled to require elaborate discussion, that if one party, upon the examination of a witness, elicits a portion only of a certain conversation or transaction, the other party may, if he desires, introduce the whole of such conversation or transaction, and may prove his version of it.

The United States attorney, in the case at bar (Tr. p. 53), for the purpose of arguing that the defendant when he engaged to ship on the *Herbert Fuller* had misled the captain, — the inference being that he then meditated this crime, — elicited the fact from the defendant on cross-examination, that he (the defendant) had told the captain, at the time of shipment, that he came from Nova Scotia, yet he had lived in Nova Scotia only a month, and that at a time three or four years prior to so stating to Captain

Nash. On redirect examination he said that he showed to Captain Nash various letters of recommendation from his former employers, and offered to introduce these letters in evidence for the purpose of showing that he had dealt frankly in conveying the information he had to the captain, and also of meeting the suggestion of the government that he had deceived the captain by stating that he hailed from Nova Scotia. The government objected, the objection was sustained, and the defendant excepted. (Tr. p. 53.)

The question whether the defendant did in fact mislead the captain during the negotiations for shipment could not fairly be determined without a knowledge of all that was said and done between them in the course of the conversation, or conversations, which led to the defendant's shipment. To the suggestion of deceit made by the government, the defendant was ready to reply, "I did not mislead Captain Nash. I showed him various letters from my former employers containing certain information as to my previous employment and character, which should be considered in connection with any statements I may have made to him."

The court in refusing to allow him to make this explanation, and to show the nature of the information about himself which he gave to Captain Nash through these letters, permitted the jury to come to a conclusion upon this issue from a fragmentary account of what had transpired. This, we maintain, was clearly error. Mr. Justice BROWN, in a recent case, speaking for this court, says, —

> "If it were competent for one party to prove this conversation, it was equally competent for the other party to prove their version of it. It may not have differed essentially from the government's version, and it may be that the defendant was not prejudiced by

the conversation as actually proved, but where the whole, or a part of a conversation has been put in evidence by one party, the other party is entitled to explain, vary or contradict it."

Carver v. *United States*, 164 U.S., 694, at page 697.

It was legitimate for the defendant to strengthen and explain his position.

See *People* v. *Barberi*, 149 N.Y. App., 256 (269, 273).

VII.

The court should not have permitted the witness Parker (Ass't 27) to testify on the government's case in rebuttal as to the length of the voyage from Cayenne to Buenos Ayres.

The pertinency of this testimony is as follows: It appeared in evidence that, immediately after the murders, the *Herbert Fuller* then being in about latitude 36° N. and longitude 53° W. (Tr. p. 50), the defendant suggested that she should be headed to go to Cayenne in French Guiana (Tr. p. 23), claiming that that was the nearest port towards her destination, namely, Rosario *via* Buenos Ayres. (Tr. p. 56.) At the trial, he so testified on his direct examination, and, on cross-examination, in this connection, said that the ordinary trip from Boston to Buenos Ayres took from fifty to seventy days. (Tr. p. 56.)

For the purpose of proving that the suggestion to go to Cayenne was an unreasonable and improper one, under the circumstances, and that it was therefore an indication of

guilt, the government called the witness Parker in rebuttal, who testified, in response to a question by the United States attorney, that, under favorable conditions, it would take from fifty to sixty days to go from Boston to Buenos Ayres. He was then asked how long it would take to go from Cayenne to Buenos Ayres. The defendant objected, and upon his examination of the witness, it appeared that although he (the witness) had sailed from Boston to Buenos Ayres, from Boston to Cayenne, and from New York to Cayenne, he had never sailed from Cayenne to Buenos Ayres, nor to Cape St. Roque (around which it would be necessary to sail in going from Cayenne to Buenos Ayres), nor from Cayenne to any other South American port. (Tr. p. 56.) The defendant's objection was overruled and an exception taken. The witness answered, "Not less than 75 or 80 days."

The question here raised is purely one of qualification. We are unable to see upon what theory it can be claimed that the witness' experience enabled him to answer the question which he was asked. He had never sailed between the ports named in the question. Moreover, it does not seem to be of the class of questions that a skilled navigator (assuming Parker to have been such) could answer unless he had actually made the voyage. It was not within the rule laid down in *Hopt* v. *Utah*, which has already been quoted in this brief in the argument under Assignment 22. The witness had had no personal observation of, or experience with, the course from Cayenne to Buenos Ayres, nor does it appear that he had any knowledge, acquired by study or inquiry, of the prevalent currents or winds which a sailing vessel going from one port to the other might encounter. His testimony, if believed, would indicate that it would have been advisable

for the *Herbert Fuller* to return to Boston and sail from that port to her destination rather than to proceed to Cayenne and clear from there to Buenos Ayres. It left open to the government the opportunity to argue that there was some ulterior and improper motive in the defendant's suggestion to take the vessel to Cayenne. In this aspect it was clearly damaging to the defendant, and, if the witness was not qualified, is ground for reversal.

VIII.

The language of the United States attorney in his final argument to the jury (Tr. p. 58), referred to in Assignment 33, viz., "He [meaning the defendant] says that Charlie Brown could leave the wheel. I say he could not. They [referring to counsel for the defendant] have produced a lot of sea-captains to say that he could leave the wheel. I put on Mr. Cutler, who was a mate on that vessel, and if you can argue from the non-production of witnesses, can you not argue from the failure to put questions?" — was so improper and so prejudicial to the defendant, especially when coupled with the comment of Judge WEBB *upon it, viz., "The facts are before the jury, the fact of calling the witnesses," as to be ground for reversal.*

As we have already stated, the defence contended that the witness known as "Charlie Brown" could have lashed the wheel of the vessel and left it for a sufficiently long time to commit the murders without his absence being necessarily detected. The government had forestalled this suggestion by calling certain of the sailors on the vessel (Anderson, Loheac, Slice, Perdok, and Wassen) on its case in

chief, and asking them the questions which have already been discussed. In rebuttal, the prosecution called one Cutler, who, it appeared, had previously sailed as mate on the *Herbert Fuller*, and attempted to elicit from him testimony of a similar character to that given in chief by the sailors. This was objected to by the defendant and excluded. The defendant did not cross-examine the witness. The portion of the argument designated in Assignment 33 referred to this episode at the trial and to testimony of this class.

The United States attorney sought, in the language quoted, to argue upon the significance of the fact that the defendant had asked Cutler no questions with reference to the matters about which the court had refused to allow him to testify. The defendant excepted to that portion of the argument. Thereupon Judge WEBB interposed the following comment: "The facts are before the jury, the fact of calling the witnesses." The United States attorney then said, "I withdraw that. That may be stricken out."

The passage quoted is objectionable, first, because it contained a statement by counsel, as if upon his own knowledge, that a material and important fact contended for by the defence, to wit, that "Charlie Brown" could leave the wheel, was not so.

Again, in the passage quoted, counsel sought to argue upon evidence excluded by the court. It was the duty of the court, when attention was called to this fact, to stop such argument then and there. Instead, however, of so doing, Judge WEBB, after objection and exception by the defendant, approved and enforced the argument by the significant remark, "The facts are before the jury, the fact of calling the witnesses." It was, we submit, equivalent to saying to the United States attorney, "It is

not necessary for you to argue that point, if it is objected to. The jury will understand the situation from the fact that you called the witness; it needs no further suggestion on your part." This, we respectfully contend, affords a further illustration of the adverse attitude which Judge WEBB had assumed toward the defendant, and had a tendency to prejudice him, independent of the impropriety of its implied approval of the objectionable argument of counsel.

It may be argued that the withdrawal, upon objection, of the remark made by counsel, obviated its damaging effect; but we understand the rule to be that the withdrawal of objectionable matter still leaves open for the appellate court the question whether such withdrawal was effectual to protect the defendant. There are numerous cases bearing more or less directly upon this point. In *Graves* v. *The United States*, 150 U.S., 118, it was held that—

When the attention of the court is specifically called to objectionable argument and objection is made to it, it is the duty of the court to interfere if it is likely to be prejudicial to the accused.

In the case at bar, as we have already submitted, the learned judge, very far from interfering, impliedly approved the language of the United States attorney.

See—

Seligman v. *Ten Eyck*, 60 Mich., 267.
Fuller v. *State*, 30 Tex. Ap., 560, 559.
Florence v. *Field*, 16 So. (Ala.) 538.
Hollywood v. *Reed*, 57 Mich., 234.

In this connection we quote the language of Mr. Justice WHITE in *Waldron* v. *Waldron*, 156 U.S., at page 380:

> "It is elementary that the admission of illegal evidence, over objection, necessitates reversal, and it is equally well established that the assertion by counsel, in argument, of facts, no evidence whereof is properly before the jury, in such a way as to seriously prejudice the opposing party, is, when duly excepted to, also ground therefor."

See —

Hall v. *United States*, 150 U.S., 76.
Wilson v. *United States*, 149 U.S., 60.
Hennies v. *Vogel*, 87 Ill., 242.
Mo. R.R. Co. v. *Metzger*, 24 Neb., at page 90.
Newton v. *The State*, 21 Fla., at pages 92, 96.
Brown v. *Swineford*, 44 Wis., 282.
People v. *Mitchell*, 62 Cal., 411.
Tucker v. *Henniker*, 41 N.H., 325.
Hill v. *State*, 42 Neb., 503.
Belyea v. *Minn.*, 63 N.W. Rep., 627.
Chicago v. *Barron*, 57 Ill. Ap., 469.

An assertion by counsel as to what a witness not called would testify, is ground for a new trial, even though the court rebuked the counsel and directed the jury to disregard his remarks.

Morris v. *Maddox*, 97 Ga., 575.

IX.

The court, in a capital case (Ass't 37), should have allowed the general exception of the defendant taken at the conclusion of the charge and before the jury had retired; but, whether allowed or not, the objectionable matters therein alleged are before this Court and may be considered.

Immediately after the charge, and before the jury had retired, the defendant claimed an exception —

> "to all objectionable and prejudicial matter, whether it was elicited by the government or the court, and to all statements of fact and opinion and examination of witnesses by one member of the court during the trial, which said matter, statements of fact, and opinion, and examination of witnesses, more specifically appear in the official stenographic report of said trial, to which reference is hereby made at pages 1080, 1348, 1372, 1385, 1482, 1483, 1484, 1490, 1572, 1593, 2000, and *aliunde*, and whether such statements, opinions, and examinations were withdrawn or not; on the ground that no right of exception is, or can be, waived in a capital case."

The questions raised under this assignment are —

First. Are the alleged objectionable matters referred to in the defendant's claim of exception properly before this Court?

Second. Will this Court consider them, even though not alleged with technical propriety and exactness? and —

Third. If the Court will consider them, are they so objectionable as to constitute reversible error?

The specific matters relied upon by the defendant under

the above claim of exception are set out in full in the record. (Tr. pp. 60 *et seq.*) They are all questions or comments by Judge WEBB, and, briefly stated, are as follows:

(*a*) The question to the government witness Loheac (Tr. p. 60)

> "*Q.* When the vessel was allowed to fall off or come up in the wind from any cause, would a person upon the deck know the facts? *A.* Yes, sir."

(Loheac's testimony tended to show that if Brown had left the wheel, which the defence contended he could have done for a sufficient length of time to commit the murders, the course of the vessel would have been materially changed. (Tr. p. 45.) The "person upon the deck" referred to the defendant, who was officer of the watch.)

(*b*) During the cross-examination of the defendant (Tr. p. 60), the comment, "He [the defendant] says he never did tell Mr. Monks so. If he never did and Monks says he did, every one will understand the consequences."

(*c*) The characterization of the loose sheets made up by the defendant, as "a pure manufacture," to which reference has already been made in this brief, in another connection. (Tr. p. 52.)

(*d*) The characterization (Tr. p. 63), during its progress, of a portion of the closing argument of the senior counsel for the prisoner as "far-fetched." (Ass'ts 23, 34, 35, 36.)

1. Is this exception before this Court? Does the fact that it was not allowed or reserved by the trial court deprive the prisoner of its benefit if he were otherwise entitled to it?

We cannot conceive that, if a defendant has properly

excepted, and it so appears upon the record, the mere refusal of the trial court to allow or reserve the point will be permitted to prejudice him. But, —

2. Did he except in a proper manner and at a proper time?

It was during the trial, and while the judge had opportunity to modify, if he could, the effect of the remarks and conduct alluded to in the request.

There is no rule for the Circuit Court for the District of Massachusetts prescribing when an exception must be taken, and the Revised Statutes are silent upon that point.

It must be conceded that it would have been better and more usual to allege the exceptions at the time the objectionable language was uttered in each instance. But is the neglect to do this fatal? This brings us to the consideration of the questions (1) whether any right of exception is, or can be, waived in a capital case? and (2) how far an appellate court will go to correct an error apparent upon the face of the record, though not reserved, or not properly reserved?

Much has been said by the courts upon this subject which indicates that the humane and beneficent rule universally prevails that, in a criminal case, and particularly in a capital case, the appellate court will consider any error apparent on the record, whether objection has been raised and exception taken in the trial court or not.

In *Rex* v. *Tilley*, 2 Leach, C.C. (4th ed.), 662, at page 670, the court, by Mr. Justice BULLER, said, —

> "In criminal cases, it is never too late to revise what has been done, and if, at any time, it appears that a prisoner is entitled to an advantage, though the ob-

jection be made out of time, the Court will always anxiously endeavor to give the prisoner the benefit of it, and find out some way in which he may avail himself of it."

In *Falk* v. *The People*, 42 Ill., 331, the court says (pp. 335, 336), —

"Suppose all the instructions given by the Court to a jury in a capital case wrong, — that they do not announce correct legal principles, or, being correct, are inapplicable to the case, and no exceptions are taken to them, — would it be the duty of an appellate court, under such circumstances, when the record shows a prisoner has been illegally condemned by misapplication of the law to his case and he asks a review of the proceedings, that such court, in the face of the record should pronounce the sentence of death upon him? An appellate court would pause when called on, under such circumstances, to pronounce the sentence, — to consign to the gallows a human being, *a record of whose trial fails to satisfy that court that justice under the law has been meted out to the prisoner*."

And in New York, the Court of Appeals has said, —

"The same strictness with respect to exceptions does not prevail in criminal as in civil cases, but the court will look at the substance rather than the form with a view to promote justice."

O'Brien, J., in *People* v. *Ledwon* (N.Y.), 46 N.E. Rep., 1046 (1048).

Again, the same learned judge has said, in —

People v. *Barberi*, 149 N.Y. Ct. App., 256, at page 278, —

"An erroneous statement of the law, or improper comments upon facts or the evidence bearing upon them, may be reviewed and corrected in this court in a capital case, without any exception, when it can be seen that they may have operated to the prejudice of the accused."

But the Supreme Court of the United States has not been silent upon this point:

Exceptions need not be taken with great precision.

Allison v. *The United States*, 160 U.S., 203.

They may be general in form.

Lewis v. *The United States*, 146 U.S., 370.

And although a question is not properly raised, yet, if a plain error was committed in a matter which is absolutely vital to the defendant, this court may feel at liberty to correct it.

Wiborg v. *United States*, 163 U.S., (at p. 658).

And Mr. Justice CLIFFORD in —

Storm v. *United States*, 94 U.S., 76, says, at page 77, —

"Whatever error of the court is apparent in the record, whether it be in the foundation, proceedings, judgment or execution of the suit, may be re-examined and corrected; but neither the rulings of the court in admitting or excluding evidence, nor the instructions

> given by the court to the jury, are a part of the record, unless made so by a proper bill of exceptions."

The same learned judge in *Suydam* v. *Williamson*, 20 How., 427, says, also, at page 433, —

> "When the cause is removed into the appellate court, any error apparent in any part of the record is within the revisory power of such tribunal.
>
> "The rule is, that whenever the error is apparent on the record, it is open to revision, whether it be made to appear by bill of exceptions, or in any other manner."

The question raised under this assignment is unlike the ones passed upon in *Lewis* v. *United States*, 146 U.S., 370, and *Alexander* v. *United States*, 138 U.S., 353, which decided that objections presented after a verdict as grounds for a new trial were not seasonably presented and were not entitled to consideration in the bill of exceptions, inasmuch as objections made after verdict do not give the court an opportunity to vary the matters objected to during the trial. In passing upon the objection so made, the court, in the latter case, said, —

> "It is the duty of counsel seasonably to call the attention of the court to any error in empanelling the jury, in admitting testimony, or in any other proceeding during the trial, by which his rights are prejudiced, and in case of an adverse ruling to note an exception."

This was done by the defendant in the case at bar. He did all that the statutes of the United States and the rules of the trial court required him to do in order to present this exception.

Rev. Sts. U.S., sec. 953.

In this connection this Court has also said that many of the state statutes are —

> "much more stringent in their requirements as to the time and mode in which the bill of exceptions shall be obtained, than the statute of Westminster 7, which first gave the bill of exceptions."
>
> *Sheppard* v. *Wilson*, 6 How., 260, at page 275.

3. If the court will consider the exception, are the matters to which it applies so objectionable as to constitute reversible error?

With the permission of the court, it is now our duty to go further and to demonstrate that the matter objected to was seriously prejudicial to the defendant.

The episode during which occurred the comment by Judge WEBB, as to the loose sheets of the log, has already been fully discussed earlier in this brief. There are three other incidents of the trial specifically set out in the record in this connection (Tr. pp. 60 *et seq.*) : —

First. The murders were committed during the defendant's watch, when it was his duty to be on deck. (Tr. p. 22.) The government, on its case in chief, called one of the sailors, Loheac, whose testimony (already referred to) tended to show that Brown, who should have been at the wheel, could not have left it, even for a short period, so that the course of the vessel would not be changed. But the witness did not go so far as to say, in reply to the questions of the United States attorney, that such absence would have been noticeable. Thereupon Judge WEBB, apparently observing the omission, asked him the question which is found in the record (Tr. p. 60), —

"When the vessel was allowed to fall off or come up in the wind from any cause, would a person upon the deck know the facts?"

To this question the witness answered, —

"Yes, sir."

We submit that this question was objectionable in form. It was leading and otherwise incompetent. It would not have been a proper question if put by the United States attorney. Its purpose clearly was to supplement the government's examination of the witness, and it did in fact elicit testimony which was damaging to the accused; for the inference was that if he had been at his post on deck, as he said he was, and the wheel had been left, his attention would necessarily have been called to the fact.

"Whilst a judge presiding at a trial has a right to put questions to a witness with reference to the issue on trial, and a court of review will allow much latitude, yet comments on the evidence, or creating evidence, or seeking to sustain a witness, by a trial judge, must be condemned." *Burke* v. *People*, 148 Ill., 70 (at p. 75).

Second. The defendant, on cross-examination (Tr. p. 60), denied that he told Monks, while on board the ship, that he was a French Canadian. Thereupon the government counsel asked him the following question: —

"If he [Monks] says that, is he telling what is not true?"

The defendant's counsel objected, and, after a colloquy, which we think is not material to the point, between coun-

sel and Judge WEBB, the latter said (referring to the question quoted above), —

> "The question is only meant to emphasize the other answer. He says he never did tell Mr. Monks so. If he never did, and Monks says he did, every one will understand the consequence."

This remark, we concede, was ambiguous. In one sense, and by itself, it was not harmful; in another, and taken in connection with the previous attitude of the judge, it may have been highly so, for there was danger that the jury would understand the learned judge to mean that there could be no doubt, as between the defendant and Monks, that the latter was telling the truth.

Third. During the closing argument of the defendant's senior counsel, the latter called attention to the fact that, while both Brown and Bram were brought to Boston in custody under suspicion of these crimes, Brown appeared as a witness before the grand jury and Bram did not, — in the following language (Tr. p. 62): —

> "The grand jury assembled in October, and you are solemnly informed by the learned district attorney that the grand jury found no bill against Brown. There is something he did not tell you, but which appears in the evidence now, Mr. Foreman and gentlemen, that Brown, a defendant charged with murder, under some mysterious arrangement is brought before the grand jury" —

At this point the United States attorney interrupted, saying, —

> "I beg your honors' pardon. There is no evidence

of what the arrangement was; none at all, on God's footstool.

"Mr. COTTER (of counsel for defendant). — I beg your pardon.

"WEBB, J. — Let us hear what the arrangement was.

"Mr. HOAR (the United States attorney.) — Mr. Cotter says that under some mysterious arrangement Mr. Brown is brought before the grand jury. Now there is absolutely no evidence on that subject in this case whatsoever. I do not think it is proper —

"Mr. COTTER. — I want to be heard on that, if your honor please. Brown is charged with murder. Brown testified himself that he was brought before the grand jury and permitted to testify. [See Tr. pp 60, 61.] Bram has testified that he was not brought before the grand jury and was not permitted to testify. I say that there is a discrimination between these two men, and I have a right to argue from that discrimination that there is a mysterious arrangement.

"Mr. HOAR. — If your honors please —

"Mr. COTTER. — An extraordinary —

"WEBB, J. — It is far-fetched, but we do not propose to interfere."

It is not necessary for us to discuss the question whether the learned judge was justified in his estimate of this argument. It was, however, for the jury to determine independently how much weight should be given it; and the expression of a disparaging — not to say contemptuous — opinion, by the court, upon argument, legitimate or otherwise, could not have operated upon their minds except to weaken and discredit not only that particular portion of the argument, but to destroy their confidence in the

advocate and their respect for anything which he had urged, or might urge, upon them in behalf of his client. Nothing can well be imagined more calculated to depreciate the entire argument, than for the judge, in the presence and hearing of the jury, to characterize it, or any portion of it, as "far-fetched," — that is to say, strained, illegitimate, illogical, and unjustifiable.

The embarrassing and paralyzing effect upon counsel of such criticism, at such a time, should also not be forgotten. It could not but have seriously impeded him in his subsequent efforts in his client's behalf.

Enough appears upon the record, we believe, to show that Judge WEBB's attitude in respect to the question of the guilt or innocence of the accused, greatly increased the odds against him; not only, as we have indicated, by throwing the weight of his opinion into the scales, but by forcing the defendant's counsel to protest in the presence of the jury, and to place themselves in the unfortunate position of antagonizing the court, — and that, therefore, if for no other reason, the defendant did not have an impartial trial.

We think we ought not to leave the discussion of this subject without calling attention to the fact that we have appealed in vain to the learned judge himself to set aside the verdict upon this ground (Tr. p. 64), before submitting the question to the determination of this Court.

X.

It was error in the court, in a case where the evidence was of the character of that in the case at bar, and under the

circumstances shown by the record, to read to the jury the statement of law contained in Assignment 38.

This quotation was from *Com.* v. *Tuey*, 8 Cush., 1 (at p. 2). We are not unmindful that this language has been considered and approved by this Court in *Allen* v. *The United States*, 164 U.S. 492 (at p. 501). But while we must, therefore, concede that it is appropriate to certain cases, we still feel that it is a dangerous and pernicious doctrine if it is to be held applicable to all cases. Dangerous, because it is likely to be misunderstood by the jury; pernicious, because it has at least a tendency to control the exercise of independent, individual opinion on the part of the jurors, and to bring about that which our system of jurisprudence has never permitted: in effect, a majority verdict. Experience has taught every *nisi prius* judge and every practising lawyer that it not infrequently happens that a minority of the jury are right. If, in such a case, any pressure by the court — for it amounts to that — is brought to bear upon the minority to persuade them to conform to the majority opinion, a great wrong is done to one party or the other, and the principle at the foundation of the English jury system is endangered.

In the case at bar the life of a human being was at stake; the evidence was close, and was largely circumstantial; the only direct testimony, that of Brown, was not free from grave suspicion (see Tr. pp. 23 and 118 *et seq.*), and the jury had been deliberating between nineteen and twenty hours (Tr. p. 63); moreover, it was Saturday, many of them lived at a distance, and they had been separated from their families and their business for nearly three weeks. It was under these circumstances that they came into court for further instructions, and the above statement of the law, which, they were informed, was "from one of

the leading cases on the subject" (Tr. p. 63), was read to them.

In such a case, involving life, if a single juror honestly believes that the burden upon the government has not been sustained, is it not his paramount duty to his conscience and his God to stand firm in that opinion, rather than to endeavor to conform to that of his fellows for the sake of avoiding a mis-trial?

Should not the court hesitate to use any lever which may move him, perhaps improperly, from that position, and which may serve to excuse him *in foro conscientiae* in acquiescing in a verdict which his judgment leads him to believe is wrong?

The language of *Com.* v. *Tuey*, if leisurely considered and properly understood, may not be thought to seriously invade the right of a defendant to a constitutional trial; but the idea which it particularly emphasizes is the importance of unanimity. It neglects to impress the far more important principle which is applicable to the case at bar, that a human being is not to be consigned to the gallows unless twelve men are individually satisfied beyond a reasonable doubt, by the effect of the evidence upon them and each of them, that he is guilty.

We have ventured to discuss this question at some length, with the less diffidence, because *Com.* v. *Tuey* does not appear to have been a capital case, and *Allen* v. *The United States* was not argued in behalf of the plaintiff in error.

Points raised in Connection with the Two Motions for a New Trial.

I.

The First Motion.

(Assignments 40–51, inclusive, 53–61, inclusive, and 63.)
(Tr. pp. 64–105, inclusive.)

These assignments relate to affidavits and oral evidence offered by the defendant and excluded by the court at the hearing on the first motion for a new trial.

The defendant offered to prove that overt acts and extraneous matters prejudicial to him were presented to, and considered by the jury, without his knowledge; but the court, against the defendant's objection and exception, rejected all expressions of opinion between jurors during the trial, and by jurors to other persons after the trial, offered by the defendant for the purpose of proving the foregoing.

While ordinarily the allowance or refusal of a new trial rests in the sound discretion of the court, yet, in the case at bar, the court excluded an affidavit and oral evidence material to the defendant's contention, without exercising discretion. Exceptions were duly taken, and the question of the admissibility of the evidence which the court refused to consider was preserved.

The court erred in refusing to receive testimony offered and described in said assignments, also in the following ruling, given in denying the first motion for a new trial, viz., —

> "We do not think the testimony admissible as to any comments one of the jurors may have made during the progress of the trial to one or more of his fellow

jurors, with respect to Bram's testimony, or as to the so-called experiment of the jury in the jury-room during their secret deliberation upon the verdict." (Tr. p. 107.)

In *Mattox* v. *United States*, 146 U.S., 140, the court says, —

"There is, however, a recognized distinction between what may and what may not be established by the testimony of jurors to set aside a verdict.

"This distinction is thus put by Mr. Justice BREWER, speaking for the Supreme Court of Kansas in *Perry* v. *Bailey*, 12 Kan. 539 (545): 'Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority, to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors: if one affirms misconduct, the remaining eleven can deny; one cannot disturb the action of the twelve; it is useless to tamper with one, for the eleven may be heard. Under this view of the law, the affidavits were properly received. They tended to prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one.'" See other cases cited in *Mattox* v. *United States*.

The trial court should have received and considered the evidence of jurors and others, described in the assignments, to show prejudicial, overt acts and extraneous matters in the jury-room or during the trial. The matters and things which the defendant offered to prove did not inhere to the verdict.

The defendant was entitled to show that the jury did not pass upon his case free from external causes tending to disturb the exercise of deliberate and unbiassed judgment.

Mattox v. *United States, supra.*

To support a motion for a new trial, affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury-room which does not essentially inhere in the verdict itself.

> "To receive the affidavit of a juror as to the independent fact that the verdict was obtained by lot, or game of chance or the like, is to receive his testimony as to a fact which, if not true, can be readily and certainly disproved by his fellow jurors; and to hear such proof would have a tendency to diminish such practices and to purify the jury-room, by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them. . . . But when he has done an act entirely independent and outside of his duty and in violation of it and the law, there can be no sound public policy which should prevent a court from hearing the best evidence of which the matter is susceptible, in order to administer justice to the party whose rights have been prejudiced by such unlawful act. In other words, public policy protects a juror in the legitimate dis-

charge of his duty, and sanctifies the result attained thereby; but if he steps aside from his duty, and does an unlawful act, he is a competent witness to prove such fact, and thereby prevent the sanction of the law from attaching to that which would otherwise be colorably lawful."

Wright v. *Ill. & Miss Tel. Co.*, 20 Iowa, 195 (at pp. 211, 212).

Misconduct of a juror in the jury-room may be shown by the affidavits of his fellow jurors, and such misconduct is good ground for a new trial.

Griffin v. *Harriman*, 74 Iowa, 436.

If this misconduct can be shown by the affidavits of jurors it may be shown by oral evidence before the court.

The defendant offered to show at the trial that the juror Briggs stated of his own knowledge that he, Briggs, was a Freemason; that the defendant was not, and that the defendant was a hypocrite. This was clearly misconduct on the part of juror Briggs, and the court erred in not permitting the defendant to introduce evidence to show that misconduct.

A juror will not be permitted to state to his fellows while they are considering their verdict, facts in the case within his personal knowledge. It was his duty to make them known during the trial.

Richards v. *State*, 36 Neb., 17 (at pp. 27, 28).
Booby v. *The State*, 4 Yerg., 111.
Wood River Bank v. *Dodge et al.*, 36 Neb., 708 (at p. 715).
Hudson v. *The State*, 9 Yerg., 408 (410).

In this latter case, the affidavit of a juror was received in support of motion for new trial to show misconduct of certain of the jurors during their deliberation.

Perry v. *Bailey*, 12 Kan., at p. 545.
Wright v. *Ill. & Miss. Tel. Co.*, 20 Iowa, 195 (at p. 210).
Hyams v. *Eames*, 41 Fed. Rep., 676.

The defendant offered evidence that the juror Briggs had prejudged him guilty before the commencement of the trial.

See affidavit of James J. Connell, Tr. p. 67.
See, also, testimony of Daniel W. Bond, who said, —

> "I had a conversation with Mr. Briggs. I asked him if he was willing to go on a case of capital punishment. I also said I did not see how anyone having read the reports in the papers could think otherwise than what [*sic*] he was guilty; and, as I remember it, he thought as I did." (Tr. p. 95.)

The juror Briggs, on his *voir dire*, having stated that he had not formed or expressed any opinion in relation to the case, and was not sensible of any bias or prejudice with regard to it (Tr. pp. 75, 76), and having contradicted the Connell affidavit (Tr. p. 99), the case is within the principle stated in *Hyams* v. *Eames*, *supra*, namely, where, in a case based upon conflicting and voluminous evidence, it appears that one of the jurors had prejudged the case and concealed that fact from the defeated party, a new trial should be granted.

Therefore, for the purpose of supporting the defendant's contention that the juror Briggs had prejudged the case,

and of showing his frame of mind before the trial began, it was competent to prove his declarations during the trial to fellow jurors, and to other parties after the trial. The trial court erred in excluding the evidence offered for these purposes.

Where the question on a motion for a new trial is whether a juror declares himself in favor of one of the parties, before the trial, and there is evidence tending to show that he did so, the affidavits from jurors showing that he made similar declarations in the jury-room are admissible.

Hyams v. *Eames, supra.*

The experiment made in the jury-room, and described in the supplementary affidavit of the juror Booth (Tr. p. 66) and in the testimony of the juror Jack (Tr. pp. 69 *et seq.*), was for the purpose of assisting the jury to determine a vital issue in the case, namely, whether Brown, standing as he described himself to have stood, could have seen the defendant strike Captain Nash. This experiment was in the nature of evidence in the case, received by the jury not in the presence of the defendant, and which he therefore had no opportunity to control, explain, or vary. It would not have been admissible if offered to be made in the court-room during the trial.

Stokes v. *The State*, 5 Baxter (Tenn.), 619.
Chicago & E. R. Co. v. *Lee*, 46 N.E. Rep. (Ind.), 543 (545).

A fortiori, it should not be permitted in the jury-room. A similar experiment, under similar circumstances, was carefully considered and discussed in *Jim.* v. *The State*, 4 Humph. (Tenn.), 289 (292).

The language of the court in the case cited is particularly applicable to the so-called experiment in the case at bar:

> "Independent, then, of the doubtful and uncertain character of the proof introduced to establish the guilt of the prisoner, we cannot permit verdicts which have been obtained like this, upon uncertain and dangerous experiments, instead of a calm, deliberate, and philosophical examination of the proof, to stand where the lives of individuals are at stake.

See, also, *Yates* v. *The People*, 38 Ill., 527.

We have been unable to find any other cases in the books in which this interesting question is discussed.

It is true that the court in the case at bar admitted *de bene* the affidavit and the testimony describing this experiment, but, at the close of the hearing upon the motion, they held it to have been inadmissible, and excluded it from their consideration. (Tr. p. 107.)

In so rejecting it, they did not exercise discretion, and their action may be reviewed by this Court.

Mattox v. *The United States*, *supra*.

II.

The Second Motion.

(Ass'ts 64–67, inclusive.)

(Tr. pp. 113–124, inclusive.)

This motion was denied, *as a matter of law*, on the ground that the new evidence was cumulative, and that the defendant and his counsel failed to exercise due diligence in ref-

erence to it before the trial; and for these reasons only, the court held, —

"*Under well-established and familiar rules of law*, the motion must be denied." (Tr. p. 124.)

1. The court erred in its ruling that the evidence contained in the affidavits in support of the second motion for a new trial was cumulative.

State v. *Tyson*, 56 Kan., 686.

The affidavits of Spencer, Messenger, and Downey show the importance and character of the new evidence offered in support of the motion. (Tr. pp. 113, 114, 115, 116.)

The affidavits were in contradiction of the only direct evidence against the accused.

The trial court stated, in denying this motion (Tr. p. 124), that "both Spencer and Messenger testified that they had tried and could not see through the window in the cabin." But when the affiant Spencer, a government witness, and Messenger, a witness called for the defence, were testifying at the trial on this subject, the judges called attention to the fact that their observations were made in the daytime, thereby indicating to the jury that the conditions were not the same as they were when Brown claimed that he saw the accused kill the captain. (Tr. pp. 122, 123.)

There was no evidence at the trial of observations or tests made in the night time, with the conditions as they were at the time the murders were committed.

Consequently the new evidence was not cumulative.

Cumulative evidence offered in support of motions for a new trial on the ground of newly discovered evidence is often of a suspicious character, and hence the reluctance on the part of the court to order a new trial on that ground.

The rule does not apply to a case where the new evidence is trustworthy, reliable, and uncontradicted, as in the case at bar, where the tests and experiments were openly made, in the presence and at the request of counsel on both sides, of officers of the *Herbert Fuller*, and other persons, and where the furniture and other objects were arranged by Spencer, one of the government's principal witnesses, and where the facts stated in the affidavits are established beyond question.

The evidence set forth in the affidavits was not only material, but, if introduced at the trial, would probably have been decisive in favor of the accused.

The experiment in the jury-room, hereinbefore described, indicated that the jury was left in doubt as to whether Brown could have seen from the wheel what he testified to. The evidence in the affidavits tended to establish an independent fact, viz., that Brown could not have seen, in the night time, what he testified to, with conditions as then existing. There was no evidence offered at the trial, by the defence, of observations or experiments in the night time, to test the correctness of Brown's evidence. The court was particular to bring out the fact before the jury that the observations made by Spencer and Messenger were in the daytime, when there was no artificial light in the cabin, and, consequently, that their testimony at the trial did not contradict Brown:

> "We must assume, so far as the record shows, that the witness who swears in his affidavit to the newly discovered facts, is a credible witness, and if so, in view of the testimony before us, it appears to us that the newly discovered evidence is highly important, and would probably produce a different result on a new

trial. . . . If, as here, it relates to distinct and independent facts of a different character, though tending to establish the same ground of claim or defence, it is not considered cumulative within the rule."

Keeler v. *Jacobs*, 87 Wis., 545 (at pp. 550, 551, and cases cited).

Layman v. *Minn. St. Ry. Co.* (Supreme Court Minn.), 69 N.W. Rep., 329, decided Dec. 16, 1896, and authorities cited.

Cumulative evidence is "additional evidence of the same kind to the same point." And although it is additional to other evidence tending to prove the same position, yet it is not cumulative if it is of a different character, tending to establish the same general result by proof of a new and distinct fact.

Parker v. *Hardy*, 24 Pick., 246 (248).

The evidence in the affidavits aforesaid differed in character from any offered at the trial.

In *Gardner* v. *Gardner*, 2 Gray, 434 (443) the court says, —

"Whether particular testimony is cumulative or not, is often a question of some nicety. This Court has, in common with many other tribunals, been disposed to limit this objection as to cumulative testimony to that which is most obviously so, and not to apply it to all testimony tending to establish the same facts. If it differs in kind, as an admission of a party to some facts about which evidence had been given of a different kind, that has been thought sufficient to take it out of the rule."

"The rule or principle requiring the denial of a motion for a new trial on the ground of the evidence, newly discovered, being cumulative, does not rest upon any just or solid foundation. It is simply the dictate of authority which has been followed without much consideration of its foundation. It is not one to be extended to cases not falling directly within its language. For there is the same propriety and necessity for giving a party a new trial who can vindicate himself or sustain his cause of action by cumulative evidence, as there is for any other reason. And there is certainly no justice in subjecting a person to what is really an unfounded claim, or for preventing him from maintaining an equally well founded defence, because the evidence discovered by him by which that can be done may be of the same quality or description as that given upon the trial in which he has been defeated."

Bulkin v. *Ehret*, 29 Abbott's New Cases, 62 (at p. 64).
Wilcox Silver Plate Co. v. *Barclay*, 48 Hun, 54.

The rule is not without limitations.

Bailey v. *State*, 36 Neb., 809 (at p. 814).
Clegg v. *N.Y. Newspaper Union*, 51 Hun, 232 (at p. 237).

The trial court erred in deciding that it was legally bound to deny the motion for the reason that the new evidence was cumulative and might have been discovered by the exercise of due diligence before the trial.

The court *may*, in its discretion, set aside a verdict and order a new trial on the ground of newly discovered evi-

dence, even if the evidence is cumulative and might have been discovered by due diligence before or during the trial.

Keet v. *Mason*, 167 Mass., 154.

2. The evidence on the second motion did not show laches on the part of the defendant or his counsel, and the court refused to exercise discretion, and erred in ruling that it was bound, as a matter of law, to deny the motion for a new trial. (Tr. p. 124.)

As to diligence of the defendant and his counsel, see record. (Tr. p. 117.)

Nothing was said before the trial as to the position of Brown and of the accused when the captain was killed. (Tr. pp. 118, 119, 120, 121.)

The evidence set forth in the affidavits could not have been obtained until the arrival of the *Herbert Fuller* in New York after the trial. (Tr. p. 113.)

At no time was the *Herbert Fuller* in this country after the murders were committed and before the verdict of the jury. The accused was without means, all the money in his possession having been taken from him at Halifax. (Tr. pp. 123, 125.)

When the witness Messenger was directed by the defendant's counsel to go to Halifax and examine the *Herbert Fuller*, the defendant, Charles Brown, and the sailors were all in jail in Boston; the passenger, Monks, was in Brookline, Mass., Spencer was in New York, and there was no one in Halifax during the stay of the *Herbert Fuller* there, after the defendant had secured counsel, who could have shown the condition of things as they were on the night of the murder. (Tr. p. 123.)

The rule against laches is not to be applied in criminal cases.

Andersen v. *State*, 43 Conn., 514 (at p. 518).

What constitutes due diligence depends so much on circumstances that it must be left largely to the discretion of the trial court.

Jones v. *Singleton*, 45 Cal., 92.

> "In criminal cases, when the life or liberty of the citizen is involved, a judge may properly exercise a liberal discretion in allowing a person convicted to have another opportunity of explanation and defence, when there is reasonable doubt as to guilt or fairness in the first trial."

Chandler v. *Thompson*, 30 Fed. Rep. (at p. 44).

The motion for a new trial is addressed to the discretion of the trial court, but where that court excludes from its consideration proper evidence offered by the moving party, or rules upon a question of law, such exclusion and ruling are reviewable by the appellate court.

Mattox v. *United States*, 146 U.S., 140.
Behan v. *Williams*, 123 Mass., 366.
Protection &c. Ins. Co. v. *Dill*, 91 Ill., 174.

For all of which reasons, we respectfully submit that the judgment of the court below should be reversed.

JAMES E. COTTER,
ASA P. FRENCH,
Counsel for Plaintiff in Error.

No. 340.

Brf. of Atty. Gen.l (Richards & Boyd) for U.S.

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In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THOMAS W. BRAM, OTHERWISE CALLED Thomas C. Bram, otherwise called Thomas M. Bram, otherwise called A. Thomas Bram, plaintiff in error,
v.
THE UNITED STATES.
No. 340.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

JAS. E. BOYD,
Assistant Attorney-General.
JOHN K. RICHARDS,
Solicitor-General.

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No. 340.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Plaintiff in error was indicted for the murder of Charles I. Nash, who was killed on the 14th day of July, 1896, on board a vessel of the United States called the *Herbert Fuller*, said vessel being upon the high seas within the admiralty and maritime jurisdiction of the United States

and out of the jurisdiction of any particular State. (Rec., p. 3.) He was tried, found guilty, and sentenced to be hanged. (Rec., pp. 18, 126.)

The bill of exceptions contains the following narrative of the homicide (Rec., pp. 21–23):

> Be it remembered, that the barkentine *Herbert Fuller* sailed from Boston on the 2d day of July, 1896, bound for Rosario, on the River Platte above Buenos Ayres, South America, with a cargo of lumber under and on deck.
>
> She had on board a captain, Charles I. Nash; Bram, the defendant; a second mate, August W. Blomberg; a steward and six seamen; also the captain's wife, Laura A. Nash, and one passenger, Lester H. Monks.
>
> The vessel proceeded on her course toward her port of destination until the night between July 13 and July 14. On that night at 12 o'clock the second mate's watch was relieved by the mate's watch, of which Bram, the defendant, was the officer in charge. The captain, his wife, the passenger, Monks, and the first mate and the second mate all lived in the aftercabin, occupying separate rooms. A draft of the aftercabin is annexed as part of this statement of facts. The crew and the steward slept forward in the forward house.
>
> When the watch was changed at midnight, Bram, the defendant, took the deck, the seamen, Loheac and Perdok, went forward on the lookout, and Charles Brown, otherwise called Justus Leopold Westerberg, his true name, took the wheel, where it was his duty to remain till 2 o'clock, at about which time he was relieved by Loheac. The second mate went to his room and the seamen of his watch to their quarters at 12 midnight, and there was no evidence that any

of them or the steward appeared again till daylight.

The passenger, Monks, who occupied a room on the starboard side of the cabin between the chart room, where the captain slept, and the room on the forward starboard side where Mrs. Nash slept, with doors opening from the passenger's room into both the chart room used by the captain as his room and that of Mrs. Nash, was aroused not far from 2 o'clock—the exact time is not known, as he says—by a scream and by another sound characterized by him as a gurgling sound. He arose, went to the captain's room, and found the captain's cot overturned and the captain lying on the floor by it. He spoke, but got no answer; put his hand on the captain's body and found it damp or wet. He then went to Mrs. Nash's room; did not see her, but saw dark spots on her bedding and suspected something wrong. He went on deck and called the mate, the defendant, telling him the captain was killed. Both went below, took down the lantern hanging in the main cabin, burning dimly, turned it up and went through the captain's room to the passenger's room, and the passenger there put on a shirt and pantaloons. They then both returned to the deck, the mate on the way stopping a brief time in his own room. Bram and Monks remained talking on deck till about daybreak, when the steward was called and told what had happened. Up to this time no call had been made for the second mate, nor had anyone visited his room. Later it was found that Captain Nash, his wife, and Blomberg, the second mate, were all dead, each with several wounds upon the head, apparently given with a sharp instrument like an ax, penetrating the skull and into the substance of the brain, and the second mate lying on his back with his feet crossed, in his berth; Mrs. Nash in her

bed, in her room, and at the back side of the bed, and Captain Nash in his room, as already stated.

The whole crew was called at or about daylight and was informed of the deaths.

The bodies were removed from the cabin and placed in the jolly-boat, and the boat was towed astern to Halifax. The cabin was then locked, Bram taking the keys, and it remained locked till the vessel reached Halifax.

At first, after the discovery of the murders, there was some hesitancy as to where the vessel should go. At the defendant's suggestion she was headed to go to Cayenne, in French Guiana, but the plan was changed and she steered for Halifax, Nova Scotia, where she arrived July 21, and was taken possession of by the local authorities at the instance of the consul-general of the United States.

At first, after the discovery of the murders, Bram, on whom had devolved the command of the ship, made Brown chief mate and Lobeae second mate.

No blood or spots of blood were ever discovered on the person or the clothing of any person on board, nor did anything direct suspicion to anyone.

In a day or two, suspicion having been excited in respect to the seaman Brown, the crew, under the supervision of Bram, seized him, he not resisting, and put him in irons. All the while the officers and seamen remained on deck. Bram navigated the ship until Sunday before they reached Halifax on Tuesday, and after the land of Nova Scotia was in sight, when, Brown having stated to his shipmates, or some of them, that he saw into the cabin through a window in the afterpart and on the starboard side of the house, and saw Bram, the mate, kill the captain. In consequence of this statement of Brown, the crew, led by the steward, suddenly

overpowered the mate and put him in irons, he making no resistance, but declaring his innocence. Bram and Brown were both carried into Halifax in irons.

At Halifax all the officers, the crew, and the passenger were examined before the American consul and gave their statements, which were reduced to writing and sworn to.

All were kept in confinement at Halifax, and Bram was brought before one Powers, a local official detective, and was searched by him and conversation was had with him.

Subsequently the crew, including Bram and Brown, and the passenger, Monks, at the request of the United States authorities, were sent by steamer direct from Halifax to Boston, and there delivered to the authorities, who lodged them all in jail.

Upon complaint of the United States district attorney, and hearing thereon before a commissioner of the United States circuit court, Bram and Brown were committed to await the action of the grand jury, and all the witnesses except Monks, the passenger, and Spencer, the steward, were restrained in jail, being unable to furnish bail.

When the grand jury were in attendance Brown was called as a witness before them. Bram did not testify before the grand jury.

Bills of indictment were returned against Bram for the murders of Captain Nash, Mrs. Nash, and the second mate, Blomberg.

No indictment was found against Brown.

POINTS AND ARGUMENT.

I.

FIRST, SECOND, AND THIRD ASSIGNMENTS OF ERROR.

The first assignment of error is as follows:

> The court erred in overruling the defendant's plea in abatement. (Substituted assignment of errors, p. 1.)

The following are the grounds of the plea in abatement:

> 1. Because certain of the grand jurors who found and returned said indictment were not duly sworn before they considered the evidence against said defendant and returned said indictment into court.
>
> 2. Because certain of the said grand jurors who acted upon the evidence against the said defendant objected and refused to being sworn, but affirmed.
>
> 3. The indictment omits to allege that the same was found and presented upon the oath and affirmation of said grand jurors. (Rec., p. 30.)

The second assignment of error is that—

> The court erred in overruling the defendant's supplemental plea in abatement. (Substituted assignment of errors, p. 1.)

The grounds of defendant's supplemental plea in abatement are as follows:

> Because one of the grand jurors who found and returned said indictment was not duly sworn before said grand jurors considered the evidence against said defendant and returned said indictment into court; and
>
> Because one of the grand jurors who found and returned said indictment was permitted to affirm,

> instead of being sworn, without stating and without being asked as to the fact that he was conscientiously scrupulous of being sworn. (Rec., p. 30.)

The following is the third assignment of error:

> The court erred in refusing to rule that one of the grand jurors (Merrill) was not duly sworn before the grand jury considered the evidence against said defendant and returned the indictment into court. (Substituted assignment of errors, p. 1.)

In *Commonwealth* v. *Smith* (9 Mass., 107, 109), the defendant filed a plea in abatement, on the ground that one of the grand jurors was a Quaker and did not take the oath required by the laws and statutes of the Commonwealth, and therefore was not qualified to act as a grand juror.

The court held that the statute providing that Quakers, when they can not conscientiously take the oath prescribed by law, are to be allowed to make affirmation; such affirmation is equivalent to the oath appointed to be taken by other persons.

The court further held:

> Objections to the personal qualifications of the jurors, or to the legality of the returns, are to be made before the indictment is found; and may be received from any person who is under a presentment for any crime whatsoever; or from any person present, who may make the suggestion as *amicus curiæ*.

Attention is called to the fact that no objection is made to any of the grand jury except Merrill. All the other members of the body are thereby admitted to be duly

qualified. Then, if the objection to Merrill is untenable, the plea in abatement was properly overruled.

Section 800 of the Revised Statutes is as follows:

> Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such State court, so far as such mode may be practicable by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and impaneling of juries in substance to the laws and usages relating to jurors in the State courts, from time to time in force in such State. This section shall not apply to juries to serve in the courts of the United States in Pennsylvania.

The Public Statutes of Massachusetts, 1882, chap. 213, sec. 5 and 6 (p. 1196), provide:

> SEC. 5. The clerk of the court shall prepare an alphabetical list of the names of all persons returned as grand jurors, and, when they are to be impaneled, the two persons first named thereon shall be first called, and the following oath shall be administered to them:
>
> "You, as grand jurors of this inquest for the body of this county of ———, do solemnly swear that you will diligently inquire, and true presentment make, of all such matters and things as shall

be given you in charge; the Commonwealth's counsel, your fellows', and your own you shall keep secret; you shall present no man for envy, hatred, or malice, neither shall you leave any man unpresented for love, fear, favor, affection, or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding. So help you God."

The other jurors shall then be called in such divisions as the court may deem proper, and the following oath shall be administered to them:

"The same oath which your fellows have taken on their part, you and each of you on your behalf shall well and truly observe and keep. So help you God."

SEC. 6. When a person returned as grand juror is conscientiously scrupulous of taking the oath before prescribed, he shall be allowed to make affirmation, substituting the word "affirm" instead of the word "swear," and also the words "this you do under the pains and penalties of perjury," instead of the words "so help you God."

Idem, chapter 3, section 3 (p. 58), provides:

In the construction of statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general court or repugnant to the context of the same statute; that is to say, * * * Fourteenth, The word "oath" shall include "affirmation" in cases where, by law, an affirmation may be substituted for an oath.

Whether or not a juror is entitled to affirm instead of being sworn is a matter to be passed upon by the court at the time, and the action of the court in this respect is not reviewable; especially in the absence of a finding

of facts, upon which the appellate court could hold the contrary, the presumption is that the person taking the affirmation was properly qualified to take this form of obligation.

The learned judge in the court below, in passing upon the plea in abatement, said:

> The section of the statutes of Massachusetts which says, "Persons having conscientious scruples may be allowed to affirm instead of taking an oath" provides no way by which the court can determine the question of his conscientious scruples. It must depend upon his own assertion. We know of no way by which the conscience can be searched by evidence to contradict the statement he himself makes in regard to his scruples. * * * The party has the discretion to declare his scruples, and as to the privilege the court has nothing to do but to allow it under the statute.

(*Horne* v. *Haverhill*, 113 Mass., 344; *State* v. *Adams*, 78 Me., 486. See also *Com.* v. *Brown*, 121 Mass., 69.)

The record shows that Merrill was duly affirmed. (See Entry Record, p. 2, October term, 1896.)

> All of said grand jurors being impaneled as aforesaid were duly sworn except grand juror William Merrill, junior, of West Newbury, who *duly affirmed*, twenty-one grand jurors being in attendance.

II.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR.

The fourth assignment of error is as follows:

> The court erred in holding that two or more counts in said indictment referring to the same transactions

> or occurrences might properly be joined without an averment that they referred to the same transactions or occurrences. (Substituted assignment of errors, p. 1.)

The only thing in the record upon which this assignment can be based is the third ground of defendant's motion to quash, which reads as follows:

> Because different counts are improperly joined or included in same indictment. (Rec., p. 31.)

Section 1024, Revised Statutes, reads thus:

> When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases the court may order them to be consolidated.

An examination of averments in the indictment and the facts in the case shows that the crimes or offenses were of the same class and were connected together. All happened within a short period of time within the narrow space of a small vessel on the high seas. As will be seen, all the counts relating to Laura R. and Laura A. Nash were nol-prossed before the trial began. Plaintiff in error was tried and convicted on the first two counts charging the killing of Charles I. Nash; the first with an instrument to the jurors unknown, the second with an ax. (*United States* v. *Peterson*, 1 Wood & M., 305; *United States* v. *Pirates*, 5 Wheat., 184 (201);

United States v. *Pointer*, 151 U. S., 396 402; *McElroy* v. *United States*, 164 U. S., 76.)

The motion to quash will be treated of under the fifth assignment.

The fifth assignment of error is as follows:

> The court erred in overruling the defendant's motion to quash. (Substituted assignment of errors, p. 1.)

Such a motion is ordinarily addressed to the discretion of the court, and a refusal to quash is not generally assignable for error. (*United States* v. *Rosenburgh*, 7 Wall., 580, 583.)

In this case the court says:

> The rule laid down by the elementary writers is that "a motion to quash is addressed to the sound discretion of the court, and, if refused, is not a proper subject of exception."
>
> When made in behalf of defendants, it is usually refused, unless in the clearest cases, and the grounds of it are left to be availed of, if available, upon demurrer or motion in arrest of judgment.

See also *United States* v. *Hamilton*, 109 U. S., 63; *Logan* v. *United States*, 144 U. S., 263, 282; *Durland* v. *United States*, 161 U. S., 306, 314.

III.

SIXTH, SEVENTH, EIGHTH, NINTH, AND TENTH ASSIGNMENTS OF ERROR.

The sixth assignment of error is as follows:

> The court erred in overruling the defendant's challenge to the array. (Substituted assignment, of error, p. 1.)

The challenge to the array is as follows:

And now comes Thomas M. Bram, the defendant named in said indictment, in his proper person, when the jury is about to be empaneled to try the issue in said indictment, and says that the said array is an illegal one, and that the order of this honorable court in reference to the drawing and apportioning of jurors for the trial of this case from different cities and towns in the district of this court in accordance with the provisions of section 802 of the Revised Statutes of the United States has not been complied with, but has been evaded.

That at a session of this court on the 14th day of November, 1896, the district attorney for the United States for said district moved, in the presence of the defendant, in open court, that a special panel consisting of one hundred jurors be drawn, from which jurors were to be selected to try the defendant of the offense charged in said indictment. That the defendant, by his counsel, in open court assented to the said motion of the district attorney. Thereupon, on the 17th day of November, 1896, it was ordered by the court that venires issue for one hundred additional jurors to come in on Monday, the 14th day of December, 1896, at 10 o'clock in the forenoon, from the several cities and towns named in Table No. 50, and apportioned as follows, viz:

Boston, sixteen; Adams, nine; Cambridge, fourteen; Woburn, thirteen; Nantucket, nine; Hyde Park, nine; Chatham, nine; Stoneham, nine; West Newbury, nine; Plainfield, three.

That the defendant expected that this order of the court would be complied with. That he is advised it was his right, and he desired and still desires to be tried by a jury drawn pursuant to that order. That it now appears by the list of jurors

presented to the defendant that the apportionment materially differs from said order of the court, and that by said present list the jurors are unjustly and against the interest of the defendant apportioned, as follows, viz:

Boston, seventeen; Adams, eleven; Cambridge, two; Woburn, twelve; Nantucket, nine; Hyde Park, nine; Chatham, eleven; Stoneham, ten; West Newbury, twelve; Plainfield, four.

That the apportionment on said list now before the defendant is contrary to the order of this court and in violation of section 802 of the Revised Statutes.

First. Because no jurors were drawn from the city of Cambridge under said order of this honorable court of November 17, 1896. That a larger number of jurors appears upon the list now before the defendant from the towns of Chatham, West Newbury, Plainfield, Stoneham, and Adams than was stated or authorized in said order of November 17.

Second. Because the following-named persons upon said list, to wit, Solomon C. Atwood, Theophile Brodeur, Martin Best, T. Weston Bryant, George O. Baird, Elijah Ball, Oliver J. Briggs, James N. Benjamin, James Buckley, Albert Brown, Oliver E. Eldridge, Nelson A. Newhall, Parker H. Nason, and Arthur A. Norcross, have been summoned and have discharged duties as jurors in this court within less than one year of the time assigned for the trial of the defendant, and were not drawn or summoned to attend this special sitting of this court, pursuant to said order of November 17, 1896.

Third. Because the fourteen jurors last named were without right and without the knowledge and consent of the defendant substituted for the fourteen persons which this court by its order of November

17 ordered to have drawn and returned from the city of Cambridge, and the defendant now objects to such substitution as a violation of his legal rights.

Fourth. Because the list of jurors now presented to the defendant contains the names of persons not residing within the several cities and towns named in Table No. 50, and in said order of this court, dated November 17, 1896.

Fifth. That a meeting of the board of aldermen of said city of Cambridge was called for Monday, the 7th day of this month, for the purpose of drawing jurors pursuant to said order of this court. That on said 7th day of December, after notice had issued for said meeting of the board of aldermen of said Cambridge, and before the arrival of the hour for which said meeting had been called, an official of the United States notified the clerk of said city of Cambridge that it would not be necessary to hold said meeting, as no jurors would be needed from said Cambridge, and consequently none were drawn from that city.

Sixth. Because the venires on which said jurors were drawn were not properly served or by persons qualified to serve the same. (Rec., pp. 36–38.)

The seventh, eighth, and ninth assignments of error are as follows:

Seventh. The court erred in holding that the defendant's objection to the apportionment of jurors was not well taken.

Eighth. The court erred in ruling that the neglect of the constable of Cambridge, to whom was committed the venire, regularly issued under the seal of this court, was no ground for challenging the array.

Ninth. The court erred in ruling that the venires had been properly served, except that which ran to

Cambridge; that the challenge to the array could not be supported; and that the jurors had been legally and properly drawn, summoned, and returned, and were fit to be empaneled to try the case. (Substituted assignment of errors, p. 1.)

The tenth assignment is as follows:

The court erred in ruling that the jurors mentioned in the order of Judge Aldrich were as regularly summoned and attending as those who had been summoned pursuant to the venires ordered on the seventeenth day of November. (Substituted assignment of errors, p. 1.)

Assignments of error from 6 to 10, inclusive (substituted assignments of error, p. 1), as will be seen, are all based on the challenge to the array, for the jurors mentioned in the order of Judge Aldrich are the same as those named in paragraph 2 of the challenge to the array. (See pp. 14 and 38 of Record.) (The rulings of the court on exception referred to in above assignment will be found on p. 40 of the Record.) The challenge to the array is made because some of the one hundred jurors asked for in addition to those already in attendance in court were, in fact, by a mistake of the constable, not summoned.

The act of September 24, 1789, chapter 20, section 29, and act of May 30, 1800, chapter 61, adopted State practice for courts of the United States in summoning jurors.

The act of July 20, 1840, chapter 47, reenacts these, and the whole of them are practically reenacted in sections 800, 802, and 803 of Revised Statutes of the United States.

The present provision is the act of June 30, 1879, chapter 52, section 2, 21 Stat. L., 43 (1 Supp., 270), which is in the alternative, permitting an order that jurors be drawn from the boxes used by the State authorities in selecting jurors in the highest courts of the State.

Section 1 of this act contains provisions for jurors in in all circuit and district courts. The amendment to this act by act of August 8, 1888, chapter 785, is unimportant in considering this case.

The Massachusetts statutes relating to selecting jurors are:

P. S., ch. 170, towns, sec. 6–12, 17–22.
Cities other than Boston, sec. 23–25, acts 1894, ch. 514.
Boston, acts 1888, ch. 123.
Additional venires, sec. 13.

The Massachusetts practice and the above United States acts are clearly set forth in—

United States v. *Richardson*, 28 F. R., 61, 1886, (C. C. Maine,) Gray, J.

This case decides that a United States venire may be issued to and served by a constable, and that Congress has recognized this by the acts respecting marshals' fees for summoning jurors drawn by constables, viz:

Act May 8, 1792, ch. 36.
Act February 28, 1799, ch. 80.
Act February 28, 1853, ch. 80.
U. S. Rev. Stat., sec. 829.

A failure of a constable to make due service of one of the subordinate venires is not ground for challenge to the array, because it does not affect the whole panel.

Com. v. *Walsh*, 124 Mass. 32.
United States v. *Richardson, supra.*

The latter is cited and followed in—

Harmon v. *United States*, 43 F. R., 560, 565. C. C. Me., Gray, J.
Harmon v. *United States*, 147 U. S., 268.
Pointer v. *United States*, 151 U. S., 396, 407 (Murder).

The bill of exceptions and record show that the venire directed to one of the constables of Cambridge was outstanding and not served as late as December 12, 1896, and also that it was never served at all, owing to the constable's error.

The court ordered the venires for jurors for the October term, 1896, and the special venires for additional jurors to issue in this case. Mere issuing of the venires by the clerk without express order would have been sufficient. (*United States* v. *Richardson, supra*, citing *United States* v. *Reed*, 2 Blatch., 435; trials of Fries (1799), 44.)

The defendant's objection to the apportionment was not that the jurors originally summoned for the term were not properly apportioned in the order for venires for them, but that the combining of the attending disengaged jurors with the additional jurors summoned made an apportionment different from that contained in either order. As the second order was for *additional* jurors (made in defendant's presence without objection), it required the

apportionment resulting from combining the latter jurors with the former.

In *Com.* v. *Walsh* (124 Mass., 32, 35), Gray, C. J., said:

> A challenge to the array is to the whole body of jurors returned from the county, and appears, at common law, to have been allowed only on account of the partiality or default of the sheriff or other officer who made the return. All the cases referred to by counsel were of that character. If the sheriff returned a juror on the nomination of one of the parties, or knowingly returned a person more favorable to one party than to the other, it showed partiality, or, as it was called, unindifferency, on the part of the sheriff, which was a ground for challenging the array, and consequently could not be a cause of challenge to the polls. So if the sheriff failed to summon a knight, in a case in which the law required a knight to be one of the jury, it showed a default on the part of the sheriff. So if the sheriff, or his bailiff or under officer, for whose acts he was responsible, returned persons who were not within the franchise, it was misconduct in the sheriff, and therefore ground for challenging the whole array. (Co. Lit., 156; 3 Bl. Com., 359; 1 Chit. Crim. Law, 536–539.) If a bailiff returned some of the jurors at the nomination of a party or his prosecutor, it was ground for a challenge to the array if the same bailiff returned the whole array, but not if the array was made by divers bailiffs. (2 Rol. Ab., 641.) If all the jurors were of affinity to a party, it was not a ground of challenge to the array, but only of challenges to the polls. (2 Rol. Ab., 638.)

The court then reviews authorities on this point.

The court further said (pp. 37–38):

> Partiality or misconduct in the issue and transmission of the venires by the sheriff or the clerk of the court might be ground for a challenge to the array, because it would show that there was no legal jury. (*Gardner* v. *Turner*, 9 Johns., 260; *Clinton* v. *Englebrecht*, 13 Wall., 434.) But an objection to the manner of preparing the jury list, or of drawing the jurors, or to the return of the constable in any town or city, does not affect the whole panel, but only the jurors from that town or city, and is therefore not a ground of challenge to the array, but only of challenges to the polls of those jurors. (6 Dane Ab., 535.)

In *The King* v. *Edmunds* (4 B. & Ald., 471, 489) Abbott, C. J., held that the failure of the sheriff to summon one of the gentlemen named in the panel of the special jury was no ground of challenge to the array, it appearing that the inferior officer, whose duty it was to serve the summons, sent it in a very negligent and blamable manner, by a carrier or newsman, instead of taking it himself.

In *State* v. *Housley* (94 N. C., 1021, 1027) Merrimon, J., said:

> Good cause of challenge to the array must be such as in contemplation of law affects adversely and renders ineligible the whole panel, as where the panel had been selected and arrayed by one or more persons, charged to select the jury, who were moved, or probably were moved, by partiality in selecting them, and the like causes. (*State* v. *Murphy*, 1 Winst., 129; *State* v. *Haywood*, 73 N. C., 437;

State v. *Martin*, 82 N. C., 632; *State* v. *Sparks*, 94 N. C., 865.)

In *State* v. *Frazier* (54 Kans., 719, 721) the court overruled a challenge to the array which was based on the ground that the jury was not made up as required by law, because no list of names had been returned from the city of Salina, and therefore no jurors were drawn from Salina. In this case there was no claim that the jurors in attendance on the court were improperly placed on the list or were persons improperly summoned. The sole objection was that the city of Salina ought to have contributed its quota of names to the list from which the jurors were drawn.

In *Schnell* v. *State* (92 Ga., 459) the court held that—

> It is no cause of challenge to the array that twelve out of the eighteen jurors constituting the array had just served as a jury for the trial of another person indicted for a like offense. * * * If the matter of the challenge was good at all it would not set aside the panel, but would be available only by challenges to the polls.

A challenge to the array must be based on objection to all the jurors composing the panel. (*Owens* v. *Stanley*, 34 Ill. App., 338, 339.)

In *State* v. *Hogan* (67 Conn., 581, 582) the defendant interposed a challenge to the array of jurors, for the reason "that for this jury term of this honorable court only four jurors were drawn by the clerk of this court in the presence of the sheriff, or one of his deputies, or otherwise, from a suitable number of jury boxes, or in any other manner."

Andrews, C. J., said (p. 583):

> A challenge to the array of jurors is an objection to the whole panel of jurors at once, and in order to be available it must be for a cause that affects all the jurors alike. (3 Bl. Com., 359; 2 Tidd's Practice, 779.) The challenge here was bad on its face, in that it was for a reason which, by its own terms, did not attach to four of the jurors whom it prayed to have rejected. It was necessarily overruled.

Objections to individuals named in the panel of jurors are not ground of challenge to the array, but such objections, if good, would be available only by challenges to the polls.

> *People* v. *Vincent*, 95 Cal., 425, 426.
> *Jones* v. *State*, 90 Ga., 616, 624.
> *Prince* v. *Com.*, 89 Va., 330.

In the absence of corruption or partiality, a failure on the part of the sheriff to summon several of the persons named in the panel is no ground of challenge to the array. (*State* v. *Stanton*, 118 N. C., 1182.)

In *The King* v. *Edmunds* (4 B. & Ald., 471, 479), Abbott, C. J., said that a challenge to the array "is always grounded upon some matter personal to the officer by whom the jury had been summoned, and their names arrayed or placed in order upon the parchment or panel whereon they are returned, in writing, to the court."

In *O'Connell* v. *The Queen* (11 Clark & F., 155, 247), Lord Chief Justice Tindal said:

> The only ground upon which the challenge to the array is allowed by the English law is the unindifferency or default of the sheriff.

Wharton says:

> Principal challenges to the array are only granted on proof of relationship, partiality, fraud, gross irregularity, or corruption on the part of the officers charged with the selection. (Wharton's Crim. Pl. and Pr., sec. 608.)

To the same effect is *State* v. *Bradley* (48 Conn., 535, 545).

The following points, relied upon by the attorney for the United States in the court below and set forth in his replication to the challenge to the array, are presented here for the consideration of the court, viz:

> First. That the jury in this case was impartially drawn according to the laws of the United States of America.
>
> Second. That said jury was not selected by design, but was drawn impartially.
>
> Third. That a larger number of jurors does not appear upon the list before the defendant from the towns of Chatham, West Newbury, Plainfield, Stoneham, and Adams than was stated and authorized to be drawn from said towns by the orders of the court.
>
> Fourth. That the jurors specially named in the list in specification two in defendant's challenge to the array were regularly summoned as jurors in the court below for the October term thereof, and were liable for service at said term, and were attending said term of the court, and were not engaged in any other trial, and were properly liable to be called as jurors for the trial of said defendant.
>
> Fifth. That the fourteen jurors specially mentioned were not substituted for any other fourteen persons which the court by the order of November

17 ordered to be drawn and returned from the city of Cambridge.

Sixth. That the list of jurors presented to the defendant contained no names of persons not residing within the several cities and towns named in the Table No. 50. (See Rec., p. 39.)

IV.

ELEVENTH AND TWELFTH ASSIGNMENTS OF ERROR.

The eleventh and twelfth assignments of error are as follows:

> 11. The court erred in overruling the challenge for cause to the juror Solomon C. Atwood.
>
> 12. The court erred in overruling the challenge for cause to the juror Martin Best. (Substituted assignment of errors, p. 2.)

These assignments of error are based upon the following:

> Upon the examination of Juror Solomon C. Atwood upon the voir dire the juror testified that he was one of the jurors who had been summoned for the regular term of said court and was still in attendance. The juror was then challenged for the cause that he was not one of those who had been summoned upon the special venires for additional jurors, but was one summoned earlier in the term and had rendered service at an earlier part of the term. It was proved that this juror had not been excused, but was still in attendance. The challenge for cause was overruled and disallowed.
>
> This juror was then peremptorily challenged.
>
> The juror Martin Best was challenged for cause, with the facts relating to him precisely the same as

those relating to Solomon C. Atwood, and this challenge for cause was likewise overruled and disallowed. The defendant excepted, and his exception was allowed.

The juror was then challenged peremptorily.

When the panel was complete, it appeared that the defendant had not exhausted all his peremptory challenges. (Rec., p. 41.)

The challenge for cause to Juror Atwood was on the ground that he was one of the fourteen jurors *unengaged* and still attending, summoned originally for October term, 1896; that he had at said term already served as a juror, and that these fourteen jurors were not properly included in the array.

The original order, made at October term, 1896 (the date of order, November 17, 1896) (Rec., p. 13), was for one hundred additional petit jurors to come on the 14th of December, 1896, and at the same time the court (Judge Aldrich) ordered that the jurors now present not in case No. 473 be excused until Monday, December 14, 1896, at 10 o'clock a. m. (Rec., p. 14.) There were fourteen of these jurors referred to in last order, among whom were Atwood and Best. (Rec., p. 14.)

As the cause of challenge as to both jurors is the same, the assignment as to Atwood only will be discussed.

He was summoned for the whole term, and the adjournment to December 14 was a continuation of the term. Having served in a previous case during the term did not disqualify him.

The cause of challenge is that the juror has been summoned and attended the said court as a juror at any

term of said court held within two years prior to the time of such challenge. (Sec. 812 Rev. Stat., U. S.)

He was properly included, because the order for the one hundred jurors was not for a special jury, but for additional jurors.

The challenge was properly tried by the court. (U. S. Rev. Stat., sec. 819.)

The defendant suffered no prejudice, because he peremptorily challenged juror Atwood, and his peremptory challenges were not exhausted at the time the panel was complete. (*Hopt* v. *Utah*, 120 U. S., 430; *Hayes* v. *Mo.*, 120 U. S., 68.)

Hence there is no manifest error in disallowing the challenge for cause.

Reynolds v. *United States*, 98 U. S., 145, Waite, C. J.

Spies v. *Illinois*, 123 U. S., 131, 180.

Cf. *No. Pac. Ry. Co.* v. *Herbert*, 116 U. S., 646, Field, J.

Right of challenge is not to select but to reject jurors.

Pointer v. *United States*, 151 U. S., 412, Harlan, J.

United States v. *Marchant*, 12 Wheat., 480, 482.

Hayes v. *Missouri*, 120 U. S., 68, 71.

Spies v. *Illinois*, 123 U. S., 168.

It is the custom to follow the State practice as to impaneling jurors; but there are no statutory requirements, and the matter is within the discretion of the court.

Lewis v. *United States*, 146 U. S., 370, Shiras, J.

Pointer v. *United States*, 151 U. S., 396, 407, Harlan, J.

St. Clair v. *United States*, 154 U. S., 134, 147, 148, Harlan, J.

The record shows that the defendant was face to face with the jurors.

Lewis v. *United States*, 146 U. S., 370–375.
Pointer v. *United States*, 151 U. S., 396, 405.

But the record shows that upon the completion of the jury the peremptory challenges of the plaintiff in error had not been exhausted, and if the court erred in ruling upon the cause of challenge no prejudice was done the plaintiff in error in the selection of the jury. "By the weight of authority the defendant can not complain of the erroneous overruling of his challenge for cause, if he afterwards challenged the juror peremptorily without exhausting his peremptory challenges, so that the juror did not serve; or, according to some of the cases, if he could have so peremptorily challenged him. But if, by such a challenge, he exhausted his peremptory challenges before the jury was completed, he is prejudiced, for his peremptory challenges have been thereby diminished, and the error will be ground for a new trial." (Clarke's Crim. Proc., Hornbook Series, Ch. 12, p. 454.) See also *People of the State of New York* v. *Larubia*, 140 N. Y., 87.

ASSIGNMENTS 13 TO 35, INCLUSIVE,

relate to ruling of the court on the admission or rejection of testimony.

As to the admission or exclusion of testimony generally—

It is an accepted principle that great latitude is allowed the judge in the admission and exclusion of testimony,

and unless it is clear that he erred there should be no reversal. Upon this point the following authorities are cited: *Alexander* v. *United States*, 138 U. S., 353; *Holmes* v. *Goldsmith*, 147 U. S., 150; *Moore* v. *United States*, 150 U. S., 57; *Thiede* v. *Utah Territory*, 159 U. S., 510.

In *Moore* v. *United States* it is held that—

> When the tendency of testimony offered in a criminal case is to throw light upon a particular fact or to explain the conduct of a particular person, there is a certain discretion on the part of the trial judge which a court of errors will not interfere with, unless it manifestly appears that the testimony has no legitimate bearing upon the question at issue and is calculated to prejudice the accused in the minds of the jurors.

Further—

> When a necessity arises for a resort to circumstantial evidence in a criminal trial, objections on the ground of relevancy are not favored, as the effect of circumstantial facts depends upon their connection with each other, and considerable latitude is allowed on the question of motive.

In delivering the opinion in this case the court say:

> There are many circumstances connected with a trial, the pertinency of which a judge who has listened to the testimony and observed the conduct of the parties and the witnesses is better able to estimate the value of than an appellate court, which is confined in its examination to the very words of the witnesses, perhaps imperfectly taken down by the reporter.

Now, considering these assignments of error separately:

Error No. 13.—The witness Leahan for the prosecution (Rec., p. 41) was asked by the prosecution. "Will you describe how you found the door between the room marked 'passenger' and the room to the rear of it there?" (The diagram of the vessel was shown to witness.) The question was objected to by defendant's attorney. Objection overruled, and the witness answered, "Yes, sir; it was locked."

Directly afterwards (Rec., p. 42) the court, in the presence of the jury, stated that the ruling admitting the question and answer should be reversed and the jury instructed to disregard the statement of this witness that he found the door locked. The Record (p. 42) shows that this was all said by the court in the presence and hearing of the jury. This was a sufficient withdrawal of the objectionable question and answer.

Error No. 14 is based on the testimony of Nicholas Power. (Rec., p. 42.) Power, a witness for the Government, testified to a conversation with Bram while the latter was in custody at Halifax. The witness was connected with the police department at Halifax and for a number of years had been on the detective force. Bram was brought to the office of the witness by the latter's direction, and while there the alleged conversation took place. Before the witness was permitted to give the conversation he was examined by the court, and, in answer to questions propounded by the court, stated that there was no inducement offered Bram, in

any way, no promise or hope of advantage held out; that nothing was said by way of suggestion to him that he might suffer if he did not speak; that the conversation was entirely voluntary; that there was no influence exerted to persuade Bram one way or the other. Witness was then allowed by the court to give the conversation. (Rec., p. 43.) Under these circumstances, although Bram was in custody and manacled, the law holds his statements to be voluntary and competent as evidence. (*Wilson* v. *United States*, 162 U. S., 613.)

Confessions are not rendered inadmissible by the fact that parties are in custody, provided they are not extorted by inducements or threats. (*Pierce* v. *United States*, 160 U. S., 355.) See also,

Hopt v. *Utah*, 110 U. S., 574.
Com. v. *Sheehan*, 163 Mass., 170.
Com. v. *Morey*, 1 Gray, 461.
Com. v. *Cuffee*, 108 Mass., 285.

And even if there was conflicting evidence as to the circumstances under which a confession is made, it may be left to the jury to decide whether or not the confession was voluntary. (*Wilson* v. *United States*, 162 U. S., 613; *Com.* v. *Preece*, 140 Mass., 276.)

Omission to caution a person making a confession or declaration does not render such confession or declaration incompetent. There are numerous authorities sustaining this position, particularly *Wilson* v. *United States* (162 U. S., 613); *Com.* v. *Robinson* (165 Mass., 426); *Com.* v. *Myers* (160 Mass., 530); *Com.* v. *Smith* (119 Mass., 305).

Error No. 15.—Defendant's counsel asked witness, Power (Rec., p. 44), "What other articles belonging to

the defendant did you take possession of at that time?" Upon objection by the United States attorney, the court excluded the question. Witness was limited in his direct examination to a particular interview. Hence the cross-examination was properly limited to the same matter. (*Phila. and Trenton R. R. Co.* v. *Stimpson*, 14 Pet., 448, 461; *Putnam* v. *United States*, 162 U. S., 707; *Blitz* v. *United States*, 153 U. S., 308.)

There was no prejudice to the defendant by the exclusion of this testimony, because he was warned that he could recall the witness as a part of his case, and he declined to do so. (*Thiede* v. *Territory of Utah*, 159 U. S., 510.)

Error No. 16.—This is based on exception to the testimony of Oscar Anderson, witness for the Government. (Rec., p. 44.)

Error No. 17.—Is based upon the testimony of witness Loheac, for the Government. (Rec., p. 45.)

Error No. 18.—Upon the testimony of witness Slice. (Rec., p. 45.)

Error No. 19.—Upon the testimony of witness Perdok. (Rec., pp. 45–46.)

Error No. 20.—Upon the testimony of witness Perdok. (Rec., p. 46.)

Error No. 21.—Upon the testimony of witness Wassen. (Rec., p. 46.)

These witnesses were all expert sailors, had been seafaring men for many years, and were ascertained to be from experience familiar with vessels and their workings, and, as such, they were interrogated severally as set

forth in the record with a view to ascertaining the effect of certain conditions in and about the wheel upon the action and course of the vessel. That they were qualified to give an opinion in this respect is indisputable.

Now as to the pertinency of such an inquiry:

Upon a review of all the facts and circumstances connected with this case, there is no reasonable conclusion save that either Bram, the defendant, or Charley Brown, the sailor at the wheel, committed the murders on board the *Herbert Fuller* on the night of the 14th of July, 1896. There is no hypothesis based upon reason which points to the guilt of any other person. Consequently, the testimony which proved or tended to prove that Charley Brown did not or could not commit the murders was competent as tending to prove the guilt of Bram. The defendant contended that Charley Brown had equal opportunity with the defendant to commit the crimes. (Rec., p. 46.) In support of this contention the defendant introduced evidence tending to show that under the conditions existing at the time of the murders it would have been possible for Brown to leave the wheel lashed for a sufficient period to enable him to commit the murders. Hence, the hypothetical questions propounded by the Government were relevant. The Government could properly ask questions showing the impossibility of any person other than the defendant committing the murders. The object of these questions was to show that Brown could not leave the wheel where he was stationed, and it was not only competent in this view but it was competent in the further view to show that Brown did not leave the wheel. (*Neal* v. *State*, 32 Nebr., 120.)

The questions called for facts in the knowledge of the witnesses. The witnesses were qualified experts, and the hypothetical facts involved in the questions were all based on evidence set out in the bill of exceptions.

The contention of the plaintiff in error that at the time of the introduction of this testimony by the Government the theory of the defense had not been suggested is misleading, because the witnesses up to that time introduced by the Government included Monks, the passenger, and Charley Brown, who was at the wheel on the night of the murders. Brown had testified that while at the wheel he looked in at the window of the aftercabin and saw the defendant strike the captain. It was therefore of great importance for the Government to show as conclusively as possible that Brown was at the wheel at the time of the commission of the murders, and the Government would have the right to do this, whether it was in anticipation of the theory of the defense or not. But it really was not in anticipation of the theory of the defense, because the cross-examination of Monks by defendant's counsel, and also of Charley Brown, clearly indicated that the purpose was to maintain that Brown, and not Bram, committed the murders.

Error No. 22.—This assignment is based on the objection to question to Dr. Frank W. Draper. (Rec., p. 47.)

The question was as follows: "Whether, in your opinion, a man standing at the hip of a recumbent person and striking a place on that person's head and forehead with an ax would necessarily be spattered with or covered with some of the blood."

Dr. Draper was for thirteen years a visiting physician of the Boston City Hospital; since 1878 had been teaching legal medicine in the Harvard Medical School; since 1889, a professor of that department; was in 1877 appointed medical examiner for Suffolk County, and as such had examined 4,680 cases, of which 1,022 had been autopsies. He stated as a fact, based upon his scientific knowledge, that the blood would spurt in the direction from which it would come from the heart, viz, toward the arteries, or in the head toward the top of the head. (Rec., p. 47.) And in answer to the question he said:

> The assailant in such a case would not necessarily receive blood spots upon his person or clothing.

In *Com.* v. *Sturtivant* (117 Mass., 122) it is held that—

> Common observers, having special opportunity for observation, may testify to their opinions as conclusions of fact, although they are not experts, if the subject-matter to which the testimony relates can not be reproduced or described to the jury precisely as it appeared to the witness at the time, and the facts upon which the witness is called to express his opinion are such as men in general are capable of comprehending and understanding.

And further—

> Whether a witness, not an expert, is qualified to express his opinion as a conclusion of fact is to be decided by the judge presiding at the trial.

Witness was competent to testify whether his qualification as an expert resulted from reading and studying alone or from his experience. (*Taylor* v. *Railroad*, 48 N. H., 305, 311; *State* v. *Wood*, 53 N. H., 484, 494; *Pierson* v. *Hoag*, 47 Barb., 243.)

Error No. 23.—Is based upon the remark of the court (Rec., p. 52): "He was making something to be used as evidence—a pure manufacture at that time." That the court here may understand this remark, and how it was elicited from the court below, it is necessary to read the examination of Bram in reference to the papers claimed to be copies of the log book from which Bram desired to refresh his memory. This testimony will be found beginning at record, page 47, and ending at record, page 52.

It will be seen that the papers referred to were not the original log book, but were entries that Bram undertook to make as a duplicate, days after the events to be entered therein had taken place, and Bram assigned as a reason for making this pretended duplicate that he thought when the ship sailed from whatever port she might make she might carry away that log book, and he wished this duplicate to show what took place on board the vessel. He stated, further, that he wanted the duplicates to bring ashore to show in case the ship went away with the original log book. Bram stated on his examination that there were many differences between the log book and the so-called duplicates. (Rec., p. 51.)

On Record, page 50, Bram admitted that the pretended duplicates were practically guesswork. In answer to a question by the court as to how he, Bram, got information necessary to enter in his log what happened on deck while the second mate had command and he, Bram, was below, Bram said: "Well, I am sorry to say that we was not particular about making errors;" and when informed by the court that the answer was not to the

question asked, Bram stated that he had no information whatever—that there was none; and when asked if his log book was presumed to cover any of the time when the second mate had command of the deck, and he, Bram, was below, Bram answered, "No, sir." (Rec., p. 50.)

So it will be seen that Bram, by his own testimony, admitted that the pretended log books or duplicates, with which he desired to refresh his memory for the purpose of testifying in this trial, were composed of entries and writings made by Bram himself in the absence of the log book of the ship, sometime after the occurrences which they purported to recite, without regard to the log book previously kept, and constructed by Bram (for his own purpose) to be used, as stated by him, on shore, in the absence of the log book. These duplicates, as further admitted by Bram, were based upon no particular data and it was not even claimed by him that at the time he made the duplicates he had in memory the incidents which his entries pretended to refer to. In other words, the entries upon these duplicates, according to Bram's own testimony, were a pure manufacture at the time he made them; and his testimony is further to the effect that he intended to show them when he came on shore as a statement of the incidents connected with the voyage of the vessel. The judge's remark, under these circumstances, was nothing more than what was apparent, and the comment made by the court was fully justified by the facts and circumstances attending the effort to bring these duplicates to the attention of the court and the jury in this trial.

But, aside from this, the court may express its opinion on part, or even on the whole, of the case if it expressly leaves the facts to the jury. (*United States* v. *Philadelphia and Reading R. R.*, 123 U. S., 113.)

In this case the court (Mr. Justice Gray delivering the opinion) say:

> Trial by jury in the courts of the United States is a trial presided over by a judge, with authority not only to rule upon objections to evidence and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination.
>
> *Vicksburg and Meridian Railroad* v. *Putnam*, 118 U. S., 545.
>
> *St. Louis, etc., Railway* v. *Vickers*, 122 U. S., 360.
>
> *Doyle* v. *Union Pacific Railway Co.*, 147 U. S., 413.

It is decided in this case that—

> It is not reversible error in a judge of a Federal court to express his own opinion of the facts if the rules of law are correctly laid down and if the jurors are given to understand that they are not bound by such expressions of opinion.
>
> *Simmons* v. *United States*, 142 U. S., 148.

The extract from the charge to the jury (Rec., p. 59) is as follows:

> You are not to be affected by any supposed indication of an opinion of the court, or if an opinion had been directly expressed to you by the court you

would have no authority to accept it in substitution for your own independent, original, careful determination on the matters yourselves.

This extract shows that all the facts were expressly left to the judgment of the jury. Further, the remark was expressly stricken out at the time attention was called to it; hence, there was no prejudice to the defendant and no exception could be taken to it.

Lewis v. *United States*, 146 U. S., 370.
Cf. United States v. *Wilson*, 69 F. R., 588.

There was no exception taken to the language of the court at the time. (Rec., p. 52.) No objection was made when the words were first used. (Rec., p. 52.) And even if there had been, objection is not exception.

Alexander v. *United States*, 138 U. S., 353.
Lindsay v. *Burgess*, 156 U. S., 208.
Newport News and Miss. Valley Co. v. *Pace*, 158 U. S., 36.
Boston and Albany R. R. Co. v. *O'Reilly*, 158 U. S., 334.

The comment of the judge was not an expression of opinion to the jury but a statement made in ruling out a request by the defendant to use the duplicates when a question was asked relating to the vessel's position. There was no objection or exception as to the correctness of the ruling. (Rec., p. 52.) Under the circumstances in which Bram admitted these duplicates were made they were not competent to refresh his memory in regard to the position of the vessel. They were not the original entries in the log book, nor was it claimed that they were even copies of the original entries. (*Putnam* v. *United States*, 162 U. S., 687.)

Error No. 24.—Bram's counsel on redirect examination of defendant (Rec., p. 53) proposed to introduce certain letters of recommendation which, Bram stated, were from former employers and which, he further stated, he had shown to Captain Nash at the time he contracted for service on the *Herbert Fuller*. Under objection by the Government, these letters were excluded. There is no rule of evidence upon which these letters, under the circumstances, were admissible. The contents of the letters, so far as this case is concerned, are unknown; but they are called letters of recommendation. They are no part of any conversation or transaction between Bram and Captain Nash introduced in evidence by the Government. It will be seen that the suggestion that the defendant misled the Captain came from the defendant's counsel at the time these letters were offered, and not from the prosecution. Bram testified that he told Captain Nash he came from Nova Scotia, and Bram explained how he hailed from there. The defendant's offer of proof did not tend to contradict this. These letters at most were the mere declarations of outsiders—persons unknown to the court and the jury, and whom counsel for the prosecution had no opportunity to examine. They were only hearsay.

Error No. 25 and Error No. 26 involve the same point, viz, that the court erred in permitting witnesses Loheac and Monks, in rebuttal, to testify as to the size of certain vomit seen by these witnesses on the deck of the vessel shortly after the murder. Loheac said: "It was about as large as the top of a spittoon." Monks said: "I think there was a good deal."

The plaintiff in error does not seem to have relied on this exception, but, as it is here presented in the substituted assignment of error for the consideration of the court, it is submitted that the order of testimony in a trial is in the discretion of the court, that this testimony was proper in rebuttal. On direct examination of Loheac, and elsewhere in the Government's case in chief, testimony as to the defendant's action near in time was allowed without objection, and it appeared that the defendant vomited and slipped into the vomit, wiping it up with his pants. The defendant, both on his direct examination and on his cross-examination, testified as to the size of the vomit, his denial taking the form that the vomit was small and wiped out by his slippers. It was then proper to allow in rebuttal evidence to contradict the evidence on which defendant's denial was based.

Goldsby v. *United States*, 160 U. S., 70.
Com. v. *Goodhue*, 154 Mass., 487.
Com. v. *Morgan*, 159 Mass., 375.

Error No. 23.—The error assigned is that the court permitted the witness Parker to testify in rebuttal how long it would take to go from Cayenne to Buenos Aires, as follows: "Not less than seventy-five or eighty days." (Rec., p. 56.)

The objection of defendant to this testimony seems to be based upon the ground that witness was not qualified to answer—that, although witness was a skilled navigator, he could not answer the question unless he had made the voyage between the points named. Parker was shown to be a seaman of forty-two years' expe-

rience at sea, thirty-five of which he had served as captain. He was certainly qualified to testify upon this point, whether he had made the voyage or not. He knew the distance, he knew the rate of speed that a vessel like the *Herbert Fuller* could travel, he knew what effect the ordinary changes and conditions of wind and weather would have upon the speed of the vessel. This was knowledge from experience and practice, which peculiarly fitted him to enlighten the court and jury upon these points.

It will be seen (Rec., p. 56) that, although witness had not sailed from Cayenne to Buenos Aires, he had sailed from Boston to Buenos Aires, from Boston to Cayenne, and from New York to Cayenne.

The Record (p. 23) shows that—

> At first after the discovery of the murders there was some hesitancy as to where the vessel should go. At the defendant's suggestion she was headed to go to Cayenne, in French Guiana, but the plan was changed and she steered for Halifax, Nova Scotia, where she arrived July 21.

At the time of the murders the *Herbert Fuller* was in about latitude 36° north and longitude 53° west. Bram suggested that she should be headed to Cayenne, in French Guiana, claiming that that was the nearest port toward her destination, viz, Rosario, via Buenos Aires. Buenos Aires is situated at the mouth of the Rio de La Plata, on the southeastern coast of South America in the Argentine Republic. French Guiana is north of Brazil and in the most northern part of South America. Rosario, the destination of the vessel, is in the ~~northwestern~~

portion of the Argentine Republic and is inland, near the Plate not far above Buenos Aires on the Rio de the range of mountains which divides Chile from the Argentine Republic. From the location of the vessel at the time of the murders, Cayenne was not the nearest port toward its destination, viz, Rosario, via Buenos Aires. In fact, it was entirely out of the line of the voyage. The court will see the importance of this testimony in the light of Bram's testimony and other facts connected with what he said and did after the murders.

Error No. 28.—Based on question and answer of Lester H. Monks, who was called in rebuttal:

> Q. When you and the mate, Bram, went down into the cabin—when you first called him and he went down with you into the cabin, what, if anything, did he do in regard to the captain's feet?
>
> A. He didn't go anywhere near the captain at all.

Upon examination it will be seen that Bram himself testified to this same fact on his direct examination. The principle involved, however, is fully discussed under error No. 25.

Error No. 29 is the same. Also 30, 31, and 32. The bill of exceptions shows that the matter referred to in error No. 32 was testified to by Bram on his direct examination. The subsequent statement in the bill that he did this for the first time on his cross-examination is a mistake.

Error No. 33.—The basis of this assignment will be found beginning on Record, page 58, as follows:

> The district attorney, in his closing argument to the jury, said: "He (referring to the defendant) says that Charlie Brown could leave that wheel. I

say he could not. They have produced a lot of sea captains to say that he could leave the wheel. I put on Mr. Cutler, who was a mate on that vessel, and if you can argue from the nonproduction of witnesses, can you not argue from the failure to put questions?"

Counsel for the defendant at this point said:

We except to that evidence—evidence excluded by the court and called out of order. We submit it is not proper and we except to that branch of his argument.

Webb, J., said:

The facts are before the jury—the fact of the calling of the witnesses.

The district attorney then said:

I withdraw that. That may be stricken out.

Attention is called to the charge of the court which immediately follows this (Rec., p. 59):

You are not to be governed by arguments of counsel beyond that degree to which they commend themselves to your own understanding and your own intelligence. You are not to be affected by any admissions or statements made by counsel in opening or closing, but you are to be governed by the evidence and the law. You are not to be affected by any supposed indication of an opinion of the court, or if an opinion had been directly expressed to you by the court you would have no authority to accept it in substitution for your own independent, original, careful determination on the matters yourselves. But in so far as you find the arguments of counsel supported by the evidence and by sound reasoning compatible with the common knowledge of mankind, in so far you will respect them. But you are the

final arbiters of the evidence and of the fact under the law as the court shall give it to you.

The district attorney's remark in itself was not unjustifiable nor prejudicial under the circumstances. He did not refer to any testimony which was not before the jury. He did not refer to any testimony which had been ruled out by the court. He only said, "If you can argue from the nonproduction of witnesses, can you not argue from the failure to put questions?" This was evidently in response to the argument of defendant's counsel that the Government had failed to produce witnesses to contradict the theory of the defendant based upon the evidence of the sea captains he had introduced.

Cutler, an experienced man, who had been mate upon this very vessel, was introduced by the Government and was asked (Rec., p. 58) as to what was the proper position of the mate at night on board the vessel. Upon objection of defendant this was ruled out. The suggestion of the district attorney could only have the effect to call attention to the fact that here was a witness familiar with the vessel—a man of experience—who was competent to testify upon that point, and defendant's counsel not only objected to his giving testimony on direct examination upon the point, but, when he was upon the stand, failed to ask any questions upon this line of inquiry. This was as legitimate argument as the argument on the other side that the Government had failed to produce witnesses; especially in view of the testimony of Cutler which was admitted by the court (Rec., p. 58) which was as follows:

Q. Have you ever steered the *Herbert Fuller?*

A. Yes, sir.
Q. How did she act?

This, as will be seen by the record, was objected to by defendant's counsel. So when the Government was attempting to reply to the testimony of the sea captains introduced by defendant by the testimony of a witness who had steered the *Herbert Fuller* and knew how she acted and where the proper position of the mate was at night, the defendant's counsel objects, and the Government is not permitted to do so; and the district attorney's remark to the jury was based upon this incident of the trial, which occurred in the presence of the jury. The district attorney argued no fact outside of the evidence. He merely called attention to an incident which occurred in the presence of the jury in the course of the trial. The remark made by the judge only referred to this incident. He said when objection was made by counsel for defendant, "The facts are before the jury. *The fact of the calling of the witnesses.*" In other words, he said that there was no fact proved by the witness, Cutler. There was nothing before the jury from his testimony except that he had been aboard the *Herbert Fuller* and had steered the vessel; that the only other fact in connection with Cutler was that he had been called as a witness and placed upon the stand by the Government.

Further, the remark was at once withdrawn on objection made, and the court in the charge warned the jury not to regard the argument. Hence, no error.

Dunlop v. *United States*, 165 U. S., 486.
Hinton v. *Railroad*, 65 Wis., 323.
United States v. *Wilson*, 69 F. R., 588.
State v. *Degonia*, 69 Mo., 485, 490.

But this assignment can not be considered, for, as the record shows (p. 59), no exception was taken at the time and consequently can not be inquired of in the court here. Defendant's counsel is not only required to call the attention of the court at once to the remarks of the district attorney which were objectionable, and to request the court's interposition, but, in case of refusal, to note an exception; unless he does this, an assignment of error is untenable.

Crumpton v. *United States*, 138 U. S., 361.
Lewis v. *United States*, 146 U. S., 370.
Chandler v. *Thompson*, 30 F. R., 38.
Com. v. *Poisson*, 157 Mass., 510.
Learned v. *Hall*, 133 Mass., 417.
Powers v. *Mitchell*, 77 Me., 361.
State v. *Degonia*, 69 Mo., 485.

And the same rule applies as to the remark of the judge if the same should be held improper. The defendant's counsel did not even enter an objection to that at the time. (Rec., p. 59.)

Error No. 34.—The question of the court was no interference with the rights of the defendant nor prejudicial to his interest. It was simply in the interest of truth. It was only intended, and only had the effect, to elicit a fact which was competent to go the jury in the trial of this cause. There is no rule of law or of propriety which forbids a judge to ask a question of a witness on the stand for the purpose of eliciting important facts pertinent to the inquiry. How could this question prejudice the defendant? The answer of the witness could have been favorable or unfavorable. The court did not

know. The purpose was to have the truth go to the jury, whether it affected the prosecution or the defendant. Here is the question (Rec., p. 60) which was propounded to the witness, Loheac, by the court:

> When the vessel was allowed to fall off or come up in the wind from any cause, would a person upon the deck know the facts?
>
> A. Yes, sir.

The pertinency of this question, based upon other facts and the theories advanced by the Government and the defendant, can be readily seen. Bram was upon the deck. It was certainly competent to inquire whether the effects upon the vessel arising from a certain condition would be known to him when this condition could only be brought about by the action of the one other person who could be charged with the murder. It is nowhere claimed by the defendant that he observed any change in the behavior of the ship during his watch on the night of the murder. Then this testimony, which was given by an expert sailor, tended to show that there could be no change in the position of the man at the wheel.

But there was no objection or exception taken at the time. (Rec., p. 60.) Hence it is not reviewable.

Error No. 35 (Rec., p. 60).—This assignment and the principles involved will be compared with matters under Error No. 23, *supra*, and also under Error No. 37, *infra*. No exception was taken at the time. See authorities on this point *supra*.

Error No. 36.—This assignment is based upon a remark of the court when an objection was made by the district attorney to the argument of defendant's counsel.

Defendant's counsel asserted that there was a mysterious arrangement by which Charlie Brown was sent before the grand jury and Bram was not. The district attorney objected to this, whereupon the counsel for the defendant said:

> I say there is a discrimination between these two men, and I have a right to argue, from that discrimination, that there is a mysterious arrangement.

This assertion was made in the colloquy between the counsel and the court which followed the district attorney's objection, and it was then the judge said:

> It is farfetched, but we do not propose to interfere.

The counsel for the defendant was indulging in an assertion which was a reflection upon the good faith of the Government in the prosecution. He was making an assertion which was without authority and without basis in fact. He was charging that some "mysterious arrangement"—some arrangement not authorized by law; some arrangement which was improper and unjust; that one man had been sent before a grand jury and another had not. The judge's characterization of this assertion, under the circumstances, was not only warranted but deserved. No objection (Rec., p. 63) was made to the remark by defendant's counsel at the time, and no exception taken. (See discussion of this principle *supra*.)

Error No. 37.—This assignment is based upon exception to the charge of the court (Rec., p. 63). The record is as follows:

> At the conclusion of the charge to the jury counsel were asked whether they excepted to the in-

structions—to anything included in or omitted from them. The reply was that the charge was entirely satisfactory. The counsel for the defendant then presented a paper claiming an exception of the most indefinite character to all objectionable and prejudicial matter.

Such an exception presents no question for the decision of this court.

Hanna v. *Maas*, 122 U. S., 24.

Thiede v. *Utah*, 159 U. S., 510, 520, 521–2, and cases cited.

Worthington v. *Mason*, 101 U. S., 149.

St. Louis, etc., Railway Co. v. *Spencer*, 71 F. R., 93, 95, and cases cited by Sanborn, J.

The exception was too late. It was too general. It assigned no grounds.

Chateaugay Ore and Iron Co. v. *Blake*, 144 U. S., 476.

Patrick v. *Graham*, 132 U. S., 627.

The alleged error relied on in this assignment is a general exception not only to the charge, but is an attempt at rehearsal, after the court had charged the jury, of all the matters which occurred during the trial. The exception by defendant's counsel under this assignment is, in substance, as follows:

> To all objectionable and prejudicial matter, whether it was elicited by the Government or the court, and all statements of fact and opinion, and examination of witnesses by one member of the court during the trial, which said matter, statements of facts and opinion, and examination of witnesses more specifically

appear in the official stenographic report of said trial, etc.

This was a wholesale exception, and was presented after defendant's counsel had announced that the judge's charge was satisfactory. It appears to be a mere afterthought. An exception in bulk to a refusal to charge several propositions can not be maintained. A general exception to the charge does not present a question that this court will consider. (See authorities cited *supra*. Also *Holder* v. *United States*, 150 U. S., 91.)

Error No. 38.—Based on charge (Rec., p. 63).

The court, in giving instructions to the jury in regard to their duties, read from one of the leading cases on the subject, as follows:

> "The only mode provided by our Constitution and laws for deciding questions of fact in criminal cases is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty can not be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet in order to bring twelve minds to a unanimous result you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided, and that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evi-

dence will be produced on one side or the other. And with this view it is your duty to decide the case if you can conscientiously do so. But in conferring together you ought to pay proper respect to each other's opinions, and listen with a disposition to be convinced to each other's arguments. And, on the other hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath.

And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight and sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

I think, gentlemen, what I have said sufficiently answers the communication which you made to the court. You will, therefore, retire for further consideration of this case.

In *Pointer* v. *United States*, 151 U. S., 396, 416, the court (Justice Harlan) say:

> If, in charging a jury, a judge chooses to employ the words of others in order to convey the exact thought in his own mind, or if he prefers for purposes merely of illustration to read from the opinions or judgments of other courts, we can not hold that such practice, although not to be encouraged,

is, in the absence of a statute prescribing a different rule, ground for the reversal of the judgment of the trial court.

If the instructions of the court followed the law, how can it prejudice the defendant, whether such instructions were delivered orally, read from manuscript, or quoted from authors or decisions of courts? The defendant's counsel has entered no objection that the instructions were not the law, but the assignment of error is based upon the fact that the judge read the instructions from one of the leading cases on the subject. It was a proper instruction, and Pointer's case decides the judge's right to read it, if he elected. There are plenty of authorities sustaining the law as set forth in that which was read by the judge.

Com. v. *Tuey*, 8 Cush., 1.
Allen v. *United States*, 164 U. S., 492.
Allis v. *United States*, 155 U. S., 117.

Errors Nos. 39–67.—Assignments of error Nos. 39 to 67, inclusive, are based upon the action of the court upon defendant's motion for a new trial. The denial of a motion for a new trial can not be assigned as error.

Moore v. *United States*, 150 U. S., 57.
Holder v. *United States*, 150 U. S., 91.
Blitz v. *United States*, 153 U. S., 308.
Wheeler v. *United States*, 159 U. S., 523.

These cases are all cited and approved in *Chune* v. *United States*, 159 U. S., 590, 591.

In all the exceptions upon which defendant based his motion for a new trial he relied on *Mattox* v. *United States*, 146 U. S., 140, and cases therein cited.

The action of the judges in the court below in overruling defendant's motion for a new trial and the rulings thereon of the court were in strict accordance with the principles laid down in the Mattox case, upon which the defendant relies. The court exercised its discretion in respect of the matter stated in the affidavits which were presented upon the motion for the new trial. The rulings of the court, beginning on record page 105 and continuing and including part of page 112, are full and explicit and meet every proposition involved in the motion for a new trial and defendant's request for findings (Rec., p. 105) as referred to in the motion.

Assignments of error from 39 to 63, inclusive, are based upon the conduct of or interference with the jury or individual members thereof.

The thirty-ninth and fortieth are based upon the refusal of the court to permit the witness, Jack, one of the jurors, to testify in regard to conversation with two others of the jurors, Booth and Briggs, during the progress of the trial, one of said conversations being with Booth in reference to where he obtained a certain paper, the presence of which in the jury room was one of the grounds alleged in the motion. The other conversation was with the juror, Briggs, relative to the defendant.

The testimony of Jack will be found in Record, page 68, and the specific exception on page 72.

The same question is involved in assignment No. 41 as to question to witness Bean. (Rec., p. 75.)

Under assignment of error No. 42 (Rec., p. 76) the court ruled upon these several questions and says:

> We have admitted in this case the affidavit of Mr. Connell, as to what one of the jurors said previous to the trial of the case, which would relate to the question of whether he had prejudged the case or not. Any further evidence, which relates to what the juror said, will also be received by the court, but any expression of opinion after the trial that any of the jurors may have made to third parties, as to his state of mind during the progress of the trial, or as to his state of mind at the conclusion of the trial, the court will reject upon grounds of public policy.

Error No. 43 is based upon the exclusion of the affidavit of Bean (Rec., p. 77). This affidavit is directly in the face of the ruling of the court.

Assignments of error 44, 45, 46, 47, 48, 49, 50, and 51 are all based upon the refusal of the court, after the verdict, to permit a member of the jury to testify as to a conversation with another member of the jury during the trial. In other words, these are all based upon the refusal of the court to permit one juror, after the rendition of the verdict, to which he had agreed, to impeach the conduct of another juror during the progress of the trial. It is a general rule that jurors can not be permitted to impeach the verdict to which they have assented and in which they have concurred. In *Woodward* v. *Leavitt* (107 Mass., 453), Judge Gray, speaking for the court, said:

> The proper evidence of the decision of the jury is the verdict returned by them on oath and affirmed in open court. It is essential to the freedom and

independence of their deliberation that their discussion in the jury room should be kept secret and inviolable, and to admit the testimony of jurors as to what took place there would create distrust, embarrassment, and uncertainty.

See also *Chadbourn* v. *Franklin*, 5 Gray, 312, 315.

One juror can not as a part of the defendant's case in chief, for disturbing the verdict, testify as to conversation with another juror about the defendant during the trial. Partiality and misconduct of the jury in the jury room can not be shown by the testimony of the juror himself or by other jurors.

Cook v. *Custner*, 9 Cush., 266.

See also:

Com. v. *Meserve*, 156 Mass., 61.

This latter case citing *Woodward* v. *Leavitt* (107 Mass., 453), which was approved in *Mattox* v. *United States* (146 U. S., 140).

See also:

Com. v. *White*, 147 Mass., 76.
United States v. *Daubner*, 17 F. R., 793.
Chandler v. *Thompson*, 30 F. R., 38.
Hannum v. *Belchertown*, 19 Pick., 311.
Rowe v. *Conney*, 139 Mass., 41.

The court heard upon the motion for a new trial by defendant, based upon the suggestion that jurors were not impartial, the affidavit of Coffin (Rec., p. 67), the affidavit of Connell (Rec., p. 67), and the testimony of Bond (Rec., p. 95). This was the testimony upon which defendant alleged that Juror Ford and Juror Briggs had made declarations prejudicial to defendant anterior to the

trial. The affidavit of Bond, which is by far the strongest indication of an expression on the part of the jury anterior to the trial, does not state a fact which would disqualify a juror. Admitting that Briggs said what Connell says, viz:

> There isn't the least doubt but things are looking bad for Bram, and I believe he is guilty.

This would not disqualify the juror if he afterwards testified on his *voire dire* that he stood indifferent. It has been held in many cases that although a juror, from reports in newspapers and other sources of information, has anterior to a trial in a capital case formed and expressed an opinion upon such reports that the prisoner at the bar is guilty, still if the juror states upon oath, when called, that notwithstanding such opinion he can hear the testimony and render an impartial verdict, he is not disqualified.

The testimony of Bond is too indefinite to be considered. Bond testifies that he made the statement (Rec., p. 95) himself, and says:

> As I remember it, he (Briggs) thought as I did.

But the juror Briggs (Rec., p. 99) swears directly and emphatically in contradiction of the statement of Connell. The affidavit of Coffin (Rec., p. 67) alleges that the conversation with the juror Ford took place after the trial, in which Ford stated that he, Mr. Ford, "said before the trial of said case that the defendant, Bram, ought to be hung." The juror Ford, when called, testifies that he had no such conversation. (Rec., p. 96.) The

court considered the facts involved in the foregoing affidavits and oral testimony and concluded that the allegations against the two jurors were unfounded. The widest scope was given the defendant by affidavit and oral testimony to show, if possible, that any juror who was engaged in the trial had by anterior conduct or declarations disqualified himself for this duty. After he had produced all of the evidence which could be had upon this proposition, he signally failed, and the court held, upon consideration of the affidavits and the oral testimony introduced by defendant, and the testimony in contradiction, that the charge against the two said jurors had not been supported.

In this case every juror was examined on the *voire dire* before being sworn to try the indictment, and counsel for the defense as well as for the prosecution had the privilege of further examination. At that stage of the proceedings every juror sworn in the case was properly qualified, and no challenge, either peremptory or for cause, being introduced, he was placed upon the panel. It was only after the verdict had been recorded that anything was heard of the present objection. In support of the objection evidence both oral and by affidavit was produced. On the other hand, the jurors alleged to have been disqualified appeared before the court and denied the accusations against them, and nothing was found to impeach the integrity of either of the jurors or to disqualify either for the duty of sitting in the cause.

Error No. 32 is based upon the exception to the testimony of James C. Ruhl, one of the bailiffs who was in

charge of the jury during the trial. (Rec., p. 91). The question propounded by the district attorney to Mr. Ruhl was as follows:

> Was there any communication between the waiters and the jurymen?

His answer was:

> No, sir.

This was a proper inquiry which had been opened during the investigation by the suggestion of defendant's counsel that waiters were permitted to enter the room of the jury. It was shown that waiters had gone into the room where the jury was for the purpose of carrying food, and doing other service in the capacity of waiters. It is further shown that the officers were present all the time the waiters were there. On page 91 of the Record the statement made by defendant's counsel is as follows:

> We claim, if your honor please, the significant fact is that strangers or foreigners—people, I do not mean under the sense of another nationality, because that might apply to me, but people who did not belong in that jury room—that they were there.

This statement was made to the court at the time when the Government was offering to prove by Ruhl that there was no communication between the jurors and the waiters who had entered the room for the purposes before stated. This testimony was proper and material to show the harmlessness of the presence of the waiters.

Nichols v. *Nichols*, 136 Mass., 256.
Com. v. *Roby*, 12 Pick., 496, 516.
People v. *Gaffney*, 14 Abb. Pr., N. S., 36.
People v. *Hartung*, 8 Abb. Pr., 132.
United States v. *Gibert*, 2 Sumn., 19.

Error No. 53.—This is based upon the refusal of the court to permit the defendant's counsel to ask the witness Jack (a juror) the following question:

> In the presence of all the jurors, and before the case was submitted to them, before the charge was delivered, did Mr. Briggs state that he made Masonic signs to the defendant and that he did not respond?

Errors Nos. 54 and 55.—Assignments 54 and 55 are of precisely the same character.

The principle involved in this assignment is of like character as that heretofore discussed, viz, the propriety of accepting the testimony of one juror concerning the conduct of another juror during the progress of a trial. (Rec., p. 94).

And here the attention of the court is called to the fact that upon this point no evidence from others than members of the jury was offered. After the juror Briggs had been upon the stand to testify in response to alleged disqualifications as a juror, and after defendant's counsel had had an opportunity to cross examine and failed to call his attention to the matters involved in the question propounded to Jack, or to ask him in reference thereto, and after defendant's counsel had based his motion in chief upon affidavits and oral testimony heretofore referred to, the proposition was, by the question to Jack, to show an entirely new ground upon which to attack the verdict of the jury. There was nothing to show that Briggs did make any signs to the defendant or declarations to the juror, except as suggested in the questions

propounded by defendant's counsel. If it were competent at all to go into an examination of this character, it should have been done at the outset as a part of the defendant's motion in chief. The attention of Briggs should have been called to it while upon the stand, in order that he might have an opportunity to admit or deny it. It would have been unfair to the juror and unfair to the court to permit the defendant, after he had presented the evidence upon which he based his motion in chief, and after the Government had been heard in reply, to introduce new witnesses and offer new testimony upon a different subject in support of his motion.

Error No. 56.—Is an exception to the ruling of the court permitting the Government to introduce testimony in reply to that introduced by the defendant in support of his motion, and specifically in permitting the witnesses Ford and Briggs to testify. It would be a strange rule which would confine the court, upon a motion for a new trial based upon affidavits and oral testimony as to prejudgment and misconduct of jurors, to the testimony offered by the party making the motion. If this was the law, any party to a suit dissatisfied with the verdict could, by the production of *ex parte* affidavits and testimony, procured from affiants and witnesses, without opportunity of examination or investigation at the hands of the adverse party, and without the right to the adverse party of reply, set aside the verdict of a jury. It is impossible to see the reason for this assignment. It is well settled that, where a motion for a new trial is

based upon an alleged prejudgment of jurors, the jurors themselves can be called to deny prejudgment or to explain their statemant on the *voire dire*.

Haskell v. *Becket*, 3 Greenl., 93.
Taylor v. *Greely*, 3 Greenl., 204.
Sawyer v. *Hopkins*, 22 Me., 268, 285, 287.
Thrall v. *Lincoln*, 28 Vt., 356.
Blackburn v. *State*, 23 O., St., 146, 165.
United States v. *Wilson*, 69 F. R., 584.
Woodward v. *Leavitt*, 107 Mass., 459, 471.

Error No. 57.—The fifty-seventh assignment of error is based upon the several rulings of the court at the close of the evidence upon a motion for a new trial. This is really an exception to the decision of the court overruling the motion for a new trial. The decision overruling a motion for a new trial can not be reviewed. Although this question has been discussed heretofore in this brief, the attention of the court is again called to the authorities cited on that point. The fact stated in the affidavit of Juror Booth (Rec., p. 65) in regard to the paper found in his hat is referred to, and this is relied upon by defendant's counsel as sufficient to set aside the verdict on the ground of extraneous influence. The affidavit states in substance that Harrington, a deputy marshal who had at times assisted the two bailiffs who had charge of the jury, approached Booth as the jury was passing from the court room through the hallway and said to him privately, "Look in your hat," which was at that time in the jury room on a hook, the number of the hook corresponding with the number of the juror's seat in the panel. Upon reaching the jury room the juror looked at his hat and

found tucked in its band a slip of paper on which was written the following:

> Would you like a ½ pint? If so, give me the tip Sat. morning. I will put it in your pocket. Red.

The juror did not act upon the hint but at once exposed the deputy to the foreman of the jury. There is no suggestion that this occurrence in any way affected the juror's opinion or action in the case. There is no reasonable ground on which to conclude that it did. The deputy, although his conduct may have been reprehensible, in no way represented or pretended to represent the prosecution, or to have any interest adverse to the defendant. The paper made no suggestion or intimation in regard to the case. It was merely an offer to furnish the juror something, presumably liquor, if the juror would request it. The paper itself is produced in court attached to Booth's affidavit, and on inspection proves to be entirely harmless.

It is further insisted that the verdict should be set aside because of the finding of a newspaper by one of the jurors during the progress of the trial. The facts in regard to the newspaper are in substance as follows:

A newspaper was found in the elevator by one of the jurors as he and his associates were passing from the court room to their boarding house. The evidence is that he did not even notice the name of the paper, but was told it by one of his fellows who saw it as he picked it up and put it in his pocket; that he never opened it or looked into it, nor passed it to any other juryman; that, though sorely tempted to read it, he reflected that

to do so would be wrong, and he thereupon delivered it the officer in charge of the jury.

In *United States* v. *Reid*, 53 U. S. (How. 12) 361, the court say that the fact that two jurors while empanneled in the case read a newspaper report of the preceding evidence, but which had no influence on their verdict was not sufficient ground for a new trial. In this case the newspaper referred to is not claimed to have had anything in reference to the trial, and the juror did not, in fact, nor did any of the jury, read it at all. While considering the case last cited, the attention of the court is called to the cases referred to in Note 1, in which it is held that the affidavits of jurors can not be read to show mistake, miscalculation, or misconduct on the part of the jury. The burden is not on the Government to show that the paper found in Booth's hat and the newspaper found in the elevator were harmless. And if it were, the papers themselves and the facts connected with them prove conclusively their harmless character.

Errors Nos. 58, 59, 60, and 61.—Assignments of error 58 and 59 are the same as has just been discussed, and the matters involved in assignments of error Nos. 60 and 61 have already been discussed.

Error No. 62 is assigned as follows:

> The court erred in finding as a fact that the jurors called denied the evidence of bias.

The jurors each swore positively, directly contradicting the statement contained in the affidavits and oral testimony offered by defendant. The allegation of bias was based upon these affidavits and oral testimony. Then, if the

court found as a fact that the jurors had not stated what was alleged in the affidavits and oral testimony offered on the part of the defendant, there could be no error in holding that the jurors denied the evidence of the bias, because this is precisely what the two jurors did.

Error No. 63 involves only matters which have been heretofore referred to. As affecting the conduct of the jury and as a ground for a new trial the defendant offered the affidavit of Juror Harry J. Booth (Rec., p. 66), in regard to an experiment said to have been made in the jury room for the purpose of ascertaining whether a man at the wheel of the *Herbert Fuller* could look in at the window of the chart room of said vessel and see anything there. This experiment and the manner of its application is fully set forth in Booth's affidavit. The experiment was not in the nature of evidence. It was not evidence. It did not bring to the knowledge of the jury any new facts or any facts other than those testified to by the witnesses on the stand.

The witnesses had testified as to the size of the ship; a chart had been shown of the different parts of the ship. Charlie Brown had testified that he was at the wheel and looked through the window of the chart room where the captain was and saw Bram strike the captain. Now, with the position of the wheel given to the jury, with the position of the chart room, of the window, and the position of the man at the wheel, the jury simply undertook, to illustrate, in a practical form, the testimony of the witnesses. Certainly, in the deliberations of a jury, the jurors have a right to discuss the bearing of testimony, the effect of testimony, and the application of testimony

to the practical affairs of life. Indeed, this is not only the province, but the duty, of the jury. Now, how could the experiment which was made by the jury as described by Booth be regarded as conduct beyond their powers or prejudicial to the defendant? There is no rule prescribed which directs the manner or the order in which a jury shall consider the evidence in making up a verdict, and the courts will not undertake to enter the precincts of the jury room and disturb their deliberations in this respect.

As to the argument of the defendant's counsel that this experiment was not in the presence of the defendant, and that he had no opportunity to control, explain, or vary it, the same argument will apply to the entire deliberations of the jury. Upon this principle, if followed out, it would be ground for a new trial that the defendant was not present in the jury room to control, explain, or vary any hypothesis suggested in the deliberations, or any line of reasoning or argument advanced by one or more of the jurors. The defendant, through his counsel, was afforded ample opportunity in the argument to the jury, before they retired, to present whatever view might be entertained which might control, explain, or vary any evidence offered in the case.

The case of *Railroad Company* v. *Lee* (46 N. E. Rep. 543) makes no reference to the action of the jury. That only refers to the competency of a witness who did not see a certain railroad accident, but who went to the scene immediately afterwards, to illustrate to the jury what he had shown to others how the accident might have happened.

Nor is the case of *Stokes* v. *State* (5 Bax., Tenn., 619) a case in point, and the opinion in *Jim* v. *State* (4 Humphrey, Tenn., 289) is based upon the fact that the jury experimented with a constable on the outside of the jury room. There is no person other than the jury who took any part in the deliberation in this case, or was called upon to take any part in the deliberations or the method of considering testimony in order to determine its weight or value in arriving at a verdict.

The incompetency of the testimony of a juror to impeach the verdict, by disclosures of what took place in the jury room, has been discussed under "*Errors No. 43 to 51.*"

Errors 64, 65, 66, and 67.—We come now to errors Nos. 64, 65, 66, and 67. These are all based upon the refusal of the court to set aside the verdict and grant a new trial upon the ground of newly discovered testimony. The basis of this motion by defendant's counsel is to be found in the affidavits of Spencer, Messenger, and Downey, pages 113–116 of the Record. These affiants give an account of an experiment which was made by them, or others in their presence, on board the *Herbert Fuller* after the trial by locating themselves at the wheel and placing objects in the after cabin, and making a light, and afterwards arranging the vessel as they understood it from the testimony to be on the night of the murders, and thus preparing themselves to testify in contradiction of the evidence of the witness Charlie Brown, the sailor, and to show by this experiment that Brown could not, standing at the wheel as he described in his testimony, see what he alleged he saw take place in the after cabin.

The defendant had already introduced testimony upon this line to the jury during the trial. The importance of this testimony was well understood by him and his counsel. In no sense can the facts set up in these affidavits be considered newly discovered testimony. It was merely cumulative and corroboratory of previous testimony, and especially that of Bram, that a man at the wheel could not see Bram strike the captain in his cabin, and the suggestion of the court, in disposing of the motion, that the defendant showed *laches* in not being prepared with this evidence at the trial was, under the circumstances, justifiable.

There is no allegation incorporated in the bill of exceptions that the rights of the defendant were prejudiced for the want of this testimony. There is no absolute rule requiring the court to award a new trial on the ground of newly discovered testimony. It is a matter within the discretion of the trial judge.

The court found as a fact that the evidence set forth in the affidavits was not newly discoverable, but was cumulative. This was a finding of fact and not reviewable.

Upon the assignments of error based upon the alleged newly discovered testimony, the following cases are cited:

State v. *Ray*, 53 Mo., 345.
People v. *Sup. Ct., N. Y.*, 5 Wend., 114.
Gardner v. *Gardner*, 2 Gray, 434.
Lowry v. *Railway*, 68 F. R., 827.

The foundation of the brief of the plaintiff in error is an attack upon the attitude of the trial judge, Webb, attempting to ascribe to him conduct based upon preju-

dice toward the prisoner. It is entirely appropriate, therefore, to close the brief of the Government by printing an extract from his opinion denying the motion for a new trial, which is to be found in the Record, pages 110–112.

> The alleged prejudice of the defendant's rights by questions, expressions, and interruptions by one of the judges engaged in the trial, next invites attention.
>
> This objection to the verdict is pressed with much earnestness and apparent sincerity. In every instance that the defendant's attorney expressed to the court his dissatisfaction the expression or the question objected to was withdrawn. Upon the hearing of this motion it has been assumed that such withdrawal was prompted by a consciousness of some error, an assumption which is unwarranted. In some instances no objection to the question or the action of the court was made. If in pressing this motion it is contended that an expression of hostility to, or at least prejudice against, the defendant was manifested, a more careful examination of the record will, we believe, disabuse the minds of the counsel on this point. The questions to the medical experts which are specified were suggested by the position taken by the defense and grew out of it. The examination of his experts by the district attorney did not cover the whole ground taken by the defense, and the questions by a member of the court only supplied that omission. The remark which was addressed to counsel about the loose sheets of paper which the defendant called a duplicate of the log book, out which the evidence showed was not a duplicate, but something else, was not a misstatement of fact, but grew out of the conten-

tion of counsel as to whether the witness should be permitted to refresh his recollection as to the course the vessel was sailing, not only from the log book, which was handed to him, but from memoranda subsequently made by him, which were not copies of the log book. Upon objection by defendant's counsel the court at once directed that every remark made be stricken out.

The questions which were asked during the cross-examination of Sprague, an expert witness called by defendant, about the helm, were proper. Only the last of these questions was objected to, when it was withdrawn and the district attorney was forbidden to repeat it.

There was an interruption by the district attorney of the argument of counsel for defendant, where he was commenting on the examination of the witness Brown before the grand jury and the nonexamination of Bram. The argument was that there had been some "mysterious arrangement" for this proceeding on the part of the district attorney. The court, or one member of it, remarked that the argument was "far-fetched," but the argument was allowed to proceed. Strictly, the argument imputing as it did some "arrangement" on the part of the prosecution was not only far-fetched, but unjustifiable. It accused the Government attorney of impropriety and abuse of his official position. The fact of calling Brown and not calling Bram before the grand jury was open to discussion and criticism in so far as it is evidenced an unfavorable discrimination and prejudgment against the defendant. It did not warrant the impeachment of the officers of the United States of the wrong of contriving or combining or colluding with anyone or in any way to injure the defendant. But waiving all discussion of the reason for the expression of the judge in this

and other instances, these objections proceed upon the unsound theory that a judge has no duty in the trial of causes except to keep order and hold counsel within the rules and the law. This theory would require a judge to stand by and silently permit carelessness, forgetfulness, oversight, or inexperience, or superior tact, or astuteness to defeat justice and right.

* * * * *

There remains for consideration only the general argument that the verdict is against the evidence and the weight thereof.

The authorities are very numerous which define the proper action of courts in reversing verdicts of juries as against evidence. The principle expounded by them may be summarily stated to be that when there is evidence in the case, which, if believed by the jury, would warrant their verdict it must stand, notwithstanding the fact that the court might have decided differently. There was such evidence in the present case, and in the light of the great preponderance of authority on this point the court can not disturb the verdict given by a jury who showed themselves conspicuously patient and attentive during a long and wearisome trial. *Moreover, in justice to the jurors compelled to engage in a most unpleasant and responsible duty, we are impelled to say that we do not see how any intelligent, conscientious, and painstaking jury having listened to the whole trial and having seen the various witnesses, could have reached any different verdict.*

JAS. E. BOYD,
Assistant Attorney-General.
JOHN K. RICHARDS,
Solicitor-General.

BRAM *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 340. Argued October 18, 19, 1897. — Decided December 13, 1897.

This was an indictment for murder alleged to have been committed on an American vessel on the high seas. After the crime was discovered, Brown, a sailor, was put in irons and the vessel was headed for Halifax. Before it reached there Brown charged Bram with the commission of the crime, saying that he had seen him do it. Bram was then also put in irons. On the arrival at Halifax, Power, a policeman and detective in the government service at that place, had a conversation with Bram. Bram was indicted at Boston for the commission of the crime, and on his trial Power was offered as a witness for the Government. He testified that he made an examination of Bram, in his own office, in the city hall at Halifax, when no one was present besides Bram and himself; and that no threats were made in any way to Bram, nor any inducements held out to him. The witness was then asked: "What did you say to him and he to you?" To this defendant's counsel objected. The defendant's counsel was permitted to cross-examine the witness before the court ruled upon the objection, and the witness stated that the conversation took place in his office, where he had caused the defendant Bram to be brought by a police officer; that up to that time the defendant had been in the custody of the police authorities of Halifax; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that at his office he stripped the defendant and examined his clothing, but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant was then in custody and did everything the witness directed him to do; that all this took place before the defendant had been examined before the United States consul, and that the witness did not know that the local authorities had at that time taken any action, or that the defendant was held for the United States — for the consul general of the United States. The witness answered questions by the court as follows: "You say there was no inducement to him in the way of

Syllabus.

promise or expectation of advantage?" "A. Not any, your honor." "Q. Held out?" "A. Not any, your honor." "Q. Nor anything said, in the way of suggestion to him that he might suffer if he did not — that it might be worse for him?" "A. No, sir; not any." "Q. So far as you were concerned, it was entirely voluntary?" "A. Voluntary, indeed." "Q. No influence on your part exerted to persuade him one way or the other?" "A. None whatever, sir; none whatever." The defendant then renewed his objection to the question, what conversation had taken place between Bram and the witness, for the following reasons: That at the time the defendant was in the custody of the chief of police at Halifax; that the witness in an official capacity directed the police authorities to bring defendant as a prisoner to his office and there stripped him; that defendant understood that he was a prisoner, and obeyed every order and direction that the witness gave. Under these circumstances the counsel submitted that no statement made by the defendant while so held in custody and his rights interfered with to the extent described was a free and voluntary statement, and no statement as made by him bearing upon this issue was competent. The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions were allowed. The witness answered as follows: "When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies." "Q. Anything further said by either of you?" "A. No; there was nothing further said on that occasion." The direct examination of this witness was limited to the interview between the witness and the defendant Bram. *Held*,

(1) That this statement made by the accused to a police officer, was evidently not a voluntary confession and was not admissible in evidence against him;

(2) That the objection to its admission, having been twice presented and regularly allowed, it was not necessary that it should be renewed at the termination of the testimony of the witness.

The objection that the indictment recited that it was presented upon the oath of the jurors when the fact was that it was presented upon the oath and affirmation of the jurors is without merit.

The objection that neither in the indictment, nor in the proof at the hearing of the pleas in abatement was it affirmatively stated or shown that grand

juror Merrill, before being permitted to affirm, was shown to have possessed conscientious scruples against taking an oath is also without merit.

As the evidence against Bram was purely circumstantial, it was clearly proper for the Government to endeavor to establish, as a circumstance in the case, the fact that another person who was present in the vicinity at the time of the killing, could not have committed the crime.

The objection to a question asked of a medical witness, whether, in his opinion, a man standing at the hip of a recumbent person and striking blows on that person's head and forehead with an axe would necessarily be spattered with, or covered with, some of the blood, was also properly overruled.

THE case is stated in the opinion.

Mr. Asa P. French and *Mr. James E. Cotter* for plaintiff in error.

Mr. Assistant Attorney General Boyd for defendants in error. *Mr. Solicitor General* was on his brief.

MR. JUSTICE WHITE delivered the opinion of the court.

This writ of error is prosecuted to a verdict and sentence thereon, by which the plaintiff was found guilty of murder, and condemned to suffer death. The homicide was committed on board the American ship Herbert Fuller while on the high seas bound from Boston to a port in South America. The accused was the first officer of the ship, and the deceased, of whose murder he was convicted, was the master of the vessel. The bill of exceptions, after stating the sailing of the vessel from Boston on the 2d of July, 1896, with a cargo of lumber, gives a general summary of the facts leading up to and surrounding the homicide as follows:

"She had on board a captain, Charles I. Nash; Bram, the defendant; a second mate, August W. Blomberg; a steward, and six seamen; also the captain's wife, Laura A. Nash, and one passenger, Lester H. Monks.

"The vessel proceeded on her course toward her port of destination until the night between July 13 and July 14. On that night at 12 o'clock the second mate's watch was relieved by the mate's watch, of which Bram, the defendant, was

the officer in charge. The captain, his wife, the passenger Monks and the first mate and the second mate, all lived in the aftercabin, occupying separate rooms. . . . The crew and the steward slept forward in the forward house.

"When the watch was changed at midnight, Bram, the defendant, took the deck, the seamen Loheac and Perdok went forward on the lookout, and Charles Brown, otherwise called Justus Leopold Westerberg, his true name, took the wheel, where it was his duty to remain till two o'clock, at about which time he was relieved by Loheac. The second mate went to his room and the seamen of his watch to their quarters at twelve midnight, and there was no evidence that any of them or the steward appeared again till daylight.

"The passenger Monks, who occupied a room on the starboard side of the cabin, between the chart room where the captain slept and the room on the forward starboard side where Mrs. Nash slept, with doors opening from the passenger's room into both the chart room used by the captain as his room and that of Mrs. Nash, was aroused not far from two o'clock — the exact time is not known, as he says — by a scream, and by another sound characterized by him as a gurgling sound. He arose, went to the captain's room, and found the captain's cot overturned and the captain lying on the floor by it. He spoke, but got no answer; put his hand on the captain's body and found it damp or wet. He then went to Mrs. Nash's room, did not see her, but saw dark spots on her bedding, and suspected something wrong. He went on deck and called the mate, the defendant, telling him the captain was killed. Both went below, took down the lantern hanging in the main cabin, burning dimly, turned it up and went through the captain's room to the passenger's room, and the passenger there put on a shirt and pantaloons. They then both returned to the deck, the mate on the way stopping a brief time in his own room. Bram and Monks remained talking on deck till about daybreak, when the steward was called and told what had happened. Up to this time no call had been made for the second mate, nor had any one visited his room. Later it was found that Captain Nash, his wife and

Blomberg, the second mate, were all dead, each with several wounds upon the head, apparently given with a sharp instrument like an axe, penetrating the skull and into the substance of the brain, and the second mate lying on his back with his feet crossed, in his berth; Mrs. Nash in her bed, in her room, and at the back side of the bed, and Captain Nash in his room, as already stated.

"The whole crew was called at or about daylight and were informed of the deaths.

"The bodies were removed from the cabin and placed in the jolly boat, and the boat was towed astern to Halifax. The cabin was then locked, Bram taking the keys, and it remained locked till the vessel reached Halifax.

"At first, after the discovery of the murders, there was some hesitancy as to where the vessel should go. At the defendant's suggestion she was headed to go to Cayenne in French Guiana, but the plan was changed and she steered for Halifax, Nova Scotia, where she arrived July 21, and was taken possession of by the local authorities at the instance of the consul general of the United States.

"At first, after the discovery of the murders, Bram, on whom had devolved the command of the ship, made Brown chief mate and Loheac second mate.

"No blood or spots of blood were ever discovered on the person or the clothing of any person on board, nor did anything direct suspicion to any one.

"In a day or two, suspicion having been excited in respect to the seaman Brown, the crew, under the supervision of Bram, seized him, he not resisting, and put him in irons. All the while the officers and seamen remained on deck. Bram navigated the ship until Sunday before they reached Halifax on Tuesday, and after the land of Nova Scotia was in sight, when, Brown having stated to his shipmates, or some of them, that he saw into the cabin through a window in the afterpart and on the starboard side of the house, and saw Bram, the mate, kill the captain. In consequence of this statement of Brown, the crew, led by the steward, suddenly overpowered the mate and put him in irons, he making no resistance, but

declaring his innocence. Bram and Brown were both carried into Halifax in irons."

The bill of exceptions further states that when the ship arrived at Halifax the accused and Brown were held in custody by the chief of police at that place, and that whilst in such custody the accused was taken from prison to the office of a detective and there questioned under circumstances to be hereafter stated. Subsequently to this occurrence at Halifax, all the officers, the crew and the passenger were examined before the American consul and gave their statements, which were reduced to writing and sworn to. They were thereafter, at the request of the American consul, sent to Boston, where the accused was indicted for the murder of Nash, the captain, of Mrs. Nash, and the second mate Blomberg. The trial and the conviction, now under review, related to the first of these charges. The errors which are here assigned as grounds for reversal, are more than sixty in number, and are classified by the counsel for the accused as follows: (*a*) Questions raised preliminary to the trial. (*b*) Questions raised during the trial. (*c*) Questions raised in connection with two motions for a new trial.

We first examine the error relied on which seems to us deserving of the most serious consideration. During the trial, a detective by whom the accused was questioned whilst at Halifax was placed upon the stand as a witness for the prosecution for the purpose of testifying to the conversation had between himself and the accused at Halifax, at the time and place already stated. What took place between the accused and the detective at the time of the conversation, and what occurred when the witness was tendered in order to prove the confession, is thus stated in the bill of exceptions:

"Nicholas Power, of Halifax, called by the Government, testified that he was connected with the police department of Halifax, and had been for thirty-two years, and for the last fifteen years of that time as a detective officer; that after the arrival of the Herbert Fuller at Halifax, in consequence of a conversation with Charles Brown, he made an examination of Bram, the defendant, in the witness's office, in the city hall

at Halifax, when no one was present besides Bram and the witness. The witness testified that no threats were made in any way to Bram, nor any inducements held out to him.

"The witness was then asked: 'What did you say to him and he to you?'

"To this the defendant's counsel objected. The defendant's counsel was permitted to cross-examine the witness before the court ruled upon the objection, and the witness stated that the conversation took place in his office, where he had caused the defendant Bram to be brought by a police officer; that up to that time the defendant had been in the custody of the police authorities of Halifax, in the custody of the superintendent of police, John O'Sullivan; that the witness asked that the defendant should be brought to his office for the purpose of interviewing him; that at his office he stripped the defendant and examined his clothing, but not his pockets; that he told the defendant to submit to an examination, and that he searched him; that the defendant was then in custody and did everything the witness directed him to do; that the witness was then a police officer acting in his official capacity; that all this took place before the defendant had been examined before the United States consul, and that the witness did not know that the local authorities had at that time taken any action, but that the defendant was held for the United States — for the consul general of the United States.

"The witness answered questions by the court as follows:

"You say there was no inducement to him in the way of promise or expectation of advantage?

"A. Not any, your honor.

"Q. Held out?

"A. Not any, your honor.

"Q. Nor anything said, in the way of suggestion to him that he might suffer if he did not — that it might be worse for him?

"A. No, sir; not any.

"Q. So far as you were concerned, it was entirely voluntary?

"A. Voluntary, indeed.

"Q. No influence on your part exerted to persuade him one way or the other?

"A. None whatever, sir; none whatever.

"The defendant then renewed his objection to the question, what conversation had taken place between Bram and the witness, for the following reasons: That at the time the defendant was in the custody of the chief of police at Halifax; that the witness in an official capacity directed the police authorities to bring the defendant as a prisoner to his private office and there proceeded to take extraordinary liberties with him; he stripped him; the defendant understood that he was a prisoner, and he obeyed every order and direction that the witness gave. Under these circumstances the counsel submitted that no statement made by the defendant while so held in custody and his rights interfered with to the extent described was a free and voluntary statement, and no statement as made by him bearing upon this issue was competent.

"The objection was overruled, and the defendant excepted on all the grounds above stated, and the exceptions were allowed.

"The witness answered as follows:

"When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' I said: 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies.

"Q. Anything further said by either of you?

"A. No; there was nothing further said on that occasion.

"The direct examination of this witness was limited to the interview between the witness and the defendant Bram.

"On cross-examination of the witness Power, he testified that at the time of the above-stated examination he took possession of a pair of suspenders belonging to the defendant, and kept the same in his office until the prisoners were coming to Boston — the whole crew and the passenger were imprisoned at Halifax, and sent as prisoners to Boston — when he handed them over to the Halifax superintendent of police, and they were sent to Boston, with other property of the defendant.

"Defendant's counsel, upon the ground of showing interest on the part of the witness, then asked: 'What other articles belonging to the defendant did you take possession of at that time?'

"This line of inquiry was objected to by the District Attorney on the ground that the matter was not opened on the direct examination, and the defendant could call the witness as part of his case if he saw fit. The court excluded the inquiry, ruling that it was not proper cross-examination and did not tend to show interest, and the defendant duly excepted, and the exception was allowed."

The contention is that the foregoing conversation, between the detective and the accused, was competent only as a confession by him made; that it was offered as such, and that it was erroneously admitted, as it was not shown to have been voluntary. The question thus presented was manifestly covered by the exception which was taken at the trial. When it was proposed to examine the detective officer as to the conversation had by him with the accused, objection was duly made. The court thereupon allowed the officer to be examined and cross-examined as to the circumstances attending the conversation which it was proposed to offer as a confession. When this examination was concluded the accused renewed his objection, and his exception to the admissibility of the conversation was allowed and regularly noted. The witness then proceeded to give the conversation. To say that under these circumstances the objection which was twice presented

and regularly allowed should have been renewed at the termination of the testimony of the witness, would be pushing to an unreasonable length the salutary rule which requires that exceptions be taken at the trial to rulings which are considered erroneous, and the legality of which are thereafter to be questioned on error. There can be no doubt that the manner in which the exception was allowed and noted fully called attention to the fact that the admission of the conversation was objected to because it was not voluntary, and the overruling of this objection is the matter now assigned as error here. Indeed, in the argument at bar no contention was made as to the sufficiency and regularity of the exception. It is manifest that the sole ground upon which the proof of the conversation was tendered was that it was a confession, as this was the only conceivable hypothesis upon which it could have been legally admitted to the jury. It is also clear that in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt. The principle on the subject is thus stated in a note to section 219 of Greenleaf on Evidence: "The rule excludes not only direct confessions, but any other declaration tending to implicate the prisoner in the crime charged, even though, in terms, it is an accusation of another, or a refusal to confess. *Rex* v. *Tyler*, 1 C. & P. 129; *Rex* v. *Enoch*, 5 C. & P. 539. See further, as to the object of the rule, *Rex* v. *Court*, 7 C. & P. 486, per Littledale, J.; *People* v. *Ward*, 15 Wend. 231." Nor from the fact that in *Wilson* v. *United States*, 162 U. S. 613,

mention was made of the circumstance that the statement of the accused was a mere denial of guilt accompanied with exculpatory explanations, does the decision in that case conflict with the principle we have just stated. The ruling there made that error to the prejudice of the accused did not arise from the admission of the statement there considered, was based not alone upon the nature of the statement but upon "the evidence of its voluntary character; the absence of any threat, compulsion or inducement; or assertion or indication of fear; or even of such influence as the administration of an oath has been supposed to exert." (p. 624.)

The contradiction involved in the assertion that the statement of an accused tended to prove guilt, and therefore was admissible, and then after procuring its admission claiming that it did not tend to prove guilt, and could not, therefore, have been prejudicial, has been well stated by the Supreme Court of North Carolina, *State* v. *Rorie*, (1876) 74 N. C. 148:

"But the State says this was a denial of guilt and not a confession. It was a declaration which the State used to procure a conviction; and it is not for the State to say the declaration did not prejudice the prisoner's case. Why introduce it at all unless it was to lay a foundation for the prosecution? The use which was made of the prisoner's statement precluded the State from saying that it was not used to his prejudice." (p. 150.)

In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself." The legal principle by which the admissibility of the confession of an accused person is to be determined is expressed in the textbooks.

In 3 Russell on Crimes, (6th ed.) 478, it is stated as follows:

"But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied

promises, however slight, nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

And this summary of the law is in harmony with the doctrine as expressed by other writers, although the form in which they couch its statement may be different. 1 Green. Ev. (15th ed.) § 219; Wharton Crim. Ev. (9th ed.) § 631; 2 Taylor Ev. (9th ed.) § 872[2]; 1 Bishop's New Crim. Proc. § 1217, par. 4.

These writers but express the result of a multitude of American and English cases, which will be found collected by the authors and editors either in the text or in notes, especially in the ninth edition of Taylor, second volume, tenth chapter, and the American notes, following page 588, where a very full reference is made to decided cases. The statement of the rule is also in entire accord with the decisions of this court on the subject. *Hopt* v. *Utah*, (1883) 110 U. S. 574; *Sparf* v. *United States*, (1895) 156 U. S. 51, 55; *Pierce* v. *United States*, (1896) 160 U. S. 355, and *Wilson* v. *United States*, (1896) 162 U. S. 613.

A brief consideration of the reasons which gave rise to the adoption of the Fifth Amendment, of the wrongs which it was intended to prevent and of the safeguards which it was its purpose unalterably to secure, will make it clear that the generic language of the Amendment was but a crystallization of the doctrine as to confessions, well settled when the Amendment was adopted, and since expressed in the text writers and expounded by the adjudications, and hence that the statements on the subject by the text writers and adjudications but formulate the conceptions and commands of the Amendment itself. In *Boyd* v. *United States*, 116 U. S. 616, attention was called to the intimate relation existing between the provision of the Fifth Amendment securing one accused against being compelled to testify against himself, and those of the

Fourth Amendment protecting against unreasonable searches and seizures; and it was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change. In commenting on the same subject, in *Brown* v. *Walker*, 161 U. S. 591, 596, the court, speaking through Mr. Justice Brown, said:

"The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that

a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was embedded in that system as one of its great and distinguishing attributes.

In *Burrowes* v. *High Commission Court*, (1616) Bulstr. pt. 3, page 48, Lord Coke makes reference to two decisions of the courts of common law as early as the reign of Queen Elizabeth, wherein it was decided that the right of a party not to be compelled to accuse himself could not be violated by the ecclesiastical courts. Whatever, after that date, may have been the departure in practice from this principle of the common law, (Taylor on Evidence, § 886[2],) certain it is that, without a statute so commanding, in *Felton's case*, (1628) 3 How. St. Tr. 371, the judges unanimously resolved, on the question being submitted to them by the King, that "no such punishment as torture by the rack was known or allowed by our law."

Lord Hale died December 25, 1676. In the first volume of his Pleas of the Crown, 1st ed. 1736, treating of the subject of confessions in cases of treason, it is said at p. 304:

"That the confession before one of the Privy Council or a justice of the peace being *voluntarily made without torture* is sufficient as to the indictment on trial to satisfy the statute, and it is not necessary that it be a confession in court; but the confession is sufficient if made before him that hath power to take an examination."

In the second volume, at p. 225, it is said:

"When the prisoner is arraigned, and demanded what he saith to the indictment, either he confesseth the indictment, or pleads to it, or stands mute, and will not answer.

"The confession is either simple, or relative in order to the attainment of some other advantage.

"That which I call a simple confession is, where the defend-

ant upon hearing of his indictment without any other respect confesseth it, this is a conviction; but it is usual for the court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead. 27 Assiz. 40.

"If it be but an extra judicial confession, tho it be in court, as where the prisoner freely tells the fact, and demands the opinion of the court whether it be felony, tho upon the fact thus shown it appear to be felony, the court will not record his confession, but admit him to plead to the felony *not guilty*. 22 Assiz. 71, and Stamf. P. C. Lib. II, cap. 51, fol. 142 *b*."

In chapter 38 of vol. 2, at p. 284, after referring to the power of justices of the peace and coroners, under the statutes of Philip and Mary, to take examinations of accused persons, but not upon oath, and that the same might be read in evidence on the trial of the prisoner, it is said:

"But then, 1. Oath must be made either by the justice or coroner, that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination.

"2. As to the examination of the prisoner, it must be testified, that he did it freely without any menace, or undue terror imposed upon him; for I have known the prisoner disown his confession upon his examination, and hath sometimes been acquitted against such his confession; . . ."

Gilbert, in his treatise on Evidence, (2d ed. — published in 1760,) says, at p. 140:

". . . But then this confession must be voluntary and without compulsion; for our law in this differs from the civil law, that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavor his own preservation; and therefore pain and force may compel men to confess what is not the truth of facts, and consequently such extorted confessions are not to be depended on."

In Hawkins' Pleas of the Crown, (6th ed., by Leach — published in 1787,) book 2, chapter 31, it is said:

"Sec. 2. . . . And where a person upon his arraign-

ment actually confesses himself guilty, or unadvisedly discloses the special manner of the fact, supposing that it doth not amount to felony where it doth, yet the judges, upon probable circumstances, that such confession may proceed from fear, menace or duress, or from weakness, or ignorance, may refuse to record such confession, and suffer the party to plead not guilty."

In section 3, chap. 46, it is stated that examinations by the common law before a Secretary of State or other magistrate for treason or other crimes not within the statutes of Philip and Mary, and also the confession of the defendant himself in discourse with private persons, might be given in evidence against the party confessing. A note (2) to this section, presumably inserted by the editor, (see note to *Gilham's case*, 2 Moody, pp. 194–5,) reads as follows:

"The human mind under the pressure of calamity, is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail. A confession, therefore, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, (*vide* O. B. 1786, page 387,) is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction."

Although the English reports, prior to the separation, are almost devoid of decisions applying the principles stated by Lord Hale, Hawkins and Gilbert, both the opinion of Lord Mansfield in *Rex* v. *Rudd*, (1775) Cowp. 331, and that of Mr. Justice Wilson, some years after the separation, in *Lambe's case*, (1791) 2 Leach, (4th ed.) 552, make it certain that the rule as stated by Hawkins, Gilbert and Hale was considered in the English courts as no longer open to question and as one of the fundamental principles of the common law. Looking at the doctrine as thus established, it would seem plainly to be deducible that as the principle from which, under the law of nature, it was held that one accused could not be com-

pelled to testify against himself, was in its essence comprehensive enough to exclude all manifestations of compulsion, whether arising from torture or from moral causes, the rule formulating the principle with logical accuracy, came to be so stated as to embrace all cases of compulsion which were covered by the doctrine. As the facts by which compulsion might manifest itself, whether physical or moral, would be necessarily ever different, the measure by which the involuntary nature of the confession was to be ascertained was stated in the rule, not by the changing causes, but by their resultant effect upon the mind, that is, hope or fear, so that, however diverse might be the facts, the test of whether the confession was voluntary would be uniform, that is, would be ascertained by the condition of mind which the causes ordinarily operated to create. The well settled nature of the rule in England at the time of the adoption of the Constitution and of the Fifth Amendment, and the intimate knowledge had by the framers of the principles of civil liberty which had become a part of the common law, aptly explain the conciseness of the language of that Amendment. And the accuracy with which the doctrine as to confessions as now formulated embodies the rule existing at common law and embedded in the Fifth Amendment was noticed by this court in *Wilson* v. *United States*, *supra*, where, after referring to the criteria of hope and fear, speaking through Mr. Chief Justice Fuller, it was said: "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." 162 U. S. 613, 623.

In approaching the adjudicated cases for the purpose of endeavoring to deduce from them what quantum of proof, in a case presented, is adequate to create, by the operation of hope or fear, an involuntary condition of the mind, the difficulty encountered is, that all the decided cases necessarily rest upon the state of facts which existed in the particular case, and, therefore, furnish no certain criterion, since the conclusion that a given state of fact was adequate to have produced an involuntary confession does not establish that the same result has been created by a different although somewhat similar con-

dition of fact. Indeed, the embarrassment which comes from the varying state of fact, considered in the decided cases, has given rise to the statement that there was no general rule of law by which the admissibility of a confession could be determined, but that the courts had left the rule to be evolved from the facts of each particular case. 2 Taylor Ev. § 872[2]. And, again, it has been said that so great was the perplexity resulting from an attempt to reconcile the authorities that it was manifest that not only must each case solely depend upon its own facts, but that even the legal rule to be applied was involved in obscurity and confusion. *Green* v. *State*, 88 Georgia, 516; *State* v. *Patterson*, 73 Missouri, 695, 705; *State* v. *Matthews*, 66 N. C. 106, 109.

The first of these statements but expresses the thought that whether a confession was voluntary was primarily one of fact, and therefore every case must depend upon its own proof. The second is obviously a misconception, for, however great may be the divergence between the facts decided in previous cases and those presented in any given case, no doubt or obscurity can arise as to the rule itself, since it is found in the text of the Constitution. Much of the confusion which has resulted from the effort to deduce from the adjudged cases what would be a sufficient quantum of proof to show that a confession was or was not voluntary, has arisen from a misconception of the subject to which the proof must address itself. The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent. With this understanding of the rule we come to a consideration of the authorities.

By statutes enacted early in the second half of the sixteenth century, 1 & 2 Ph. & M. c. 13 and 2 & 3 Ph. & M. c. 10,

justices of the peace were directed on accusations of felony to "take the examination of the said prisoner and information of them that bring him." In 1655, the judges directed that the examination of prisoners should be without oath, J. Kel. 2, and the reason of this rule, Starkie on Evidence, (2d ed. p. 29) says, was that an examination under oath "would be a species of duress and a violation of the maxim that no one is bound to criminate himself." The ruling of the judges in this regard was recognized in the statute of 7 George IV, chap. 64, which, although requiring "information of witnesses" to be "upon oath," simply directed an "examination" of the accused.

But, even where the examination was held without oath, it came to be settled by judicial decisions in England that before such an examination could be received in evidence it must appear that the accused was made to understand that it was optional with him to make a statement. *Rex* v. *Green*, (1832) 5 Car. & P. 312; *Reg.* v. *Arnold*, (1838) 8 Car. & P. 621. The reason upon which this rule rested undoubtedly was, that the mere fact of the magistrate's taking the statement, even though unaccompanied with an oath, might, unless he was cautioned, operate upon the mind of the prisoner to impel him involuntarily to speak. The judicial rule as to caution was finally embodied into positive law by the statute of 11 & 12 Vict. c. 42, where, by section 18, the magistrate was directed, after having read or caused to be read to the accused the depositions against him, to ask the accused: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial."

The English courts were frequently called upon to determine whether language used by a magistrate when about to take the examination of one accused, tended to induce in the mind of the latter such hope or fear as to lead to involuntary mental action. In *Reg.* v. *Drew*, (1837) 8 Car. & P. 140, and *Reg.* v. *Harris*, (1844) 1 Cox C. C. 106, though the accused had been cautioned not to say anything to prejudice himself,

the further statement, in substance, by the magistrate or his clerk, that what the prisoner said would be taken down, and "would" be used for or against him at his trial, was held by Coleridge, J., to be equivalent to saying that what the prisoner chose to say might be used in his favor at the trial, and was a direct inducement to make a confession, rendering the statement incompetent as evidence. Like rulings were also made in cases where similar assurance that the statement of the prisoner would be used were made to him by a police officer. *Reg.* v. *Morton*, (1843) 2 Moo. & Rob. 514, and *Reg.* v. *Furley*, (1844) 1 Cox C. C. 76.

In cases where statements of one accused had been made to others than the magistrate upon an examination, differences of opinion arose among the English judges, as to whether a confession made to a person not in a position of authority over the accused, was admissible in evidence after an inducement has been held out to the prisoner by such person. *Rex* v. *Spencer*, (1837) 7 Car. & P. 776. It was finally settled, however, that the effect of inducements must be confined to those made by persons in authority, *Reg.* v. *Taylor*, (1839) 8 Car. & P. 733; *Reg.* v. *Moore*, (1852) 2 Den. C. C. 522; although, in the last cited case, while former precedents were followed, the court expressed strong doubts as to the wisdom of the restriction. (p. 527.) There can be no question, however, that a police officer, actually or constructively in charge of one in custody on a suspicion of having committed crime, is a person in authority within the rule, and as this is so well established, we will not consider the adjudicated cases in order to demonstrate it, but content ourselves with a reference to the statement on the subject made in Russell on Crimes, third volume, at page 501.

Many other cases in the English reports illustrate the application of the rule excluding statements made under inducement improperly operating to influence the mind of an accused person.

In *Rex* v. *Thompson*, (1783) 1 Leach, (4th ed.) 291, a declaration to a suspected person that unless he gave a more satisfactory account of his connection with a stolen bank note his

interrogator would take him before a magistrate, was held equivalent to stating that it would be better to confess, and to have operated to lead the prisoner to believe that he would not be taken before a magistrate if he confessed. Baron Hotham, after commenting upon the evidence, in substance, said that the prisoner was hardly a free agent at the time, as though the language addressed to him scarcely amounted to a threat, it was certainly a strong invitation to the prisoner to confess, the manner in which it had been expressed rendering it more efficacious.

In *Cass' case*, (1784) 1 Leach, 293, a confession induced by the statement of the prosecutor to the accused, "I am in great distress about my irons; if you will tell me where they are, I will be favorable to you," was held inadmissible. Mr. Justice Gould said that the slightest hopes of mercy held out to a prisoner to induce him to disclose the fact was sufficient to invalidate a confession.

In the cases following, statements made by a prisoner were held inadmissible, because induced by the language set out in each case: In *Rex* v. *Griffin*, (1809) Russ. & Ry. 151, telling the prisoner that it would be better for him to confess; in *Rex* v. *Jones*, (1809) Russ. & Ry. 152, the prosecutor saying to the accused that he only wanted his money, and if the prisoner gave him that he might go to the devil, if he pleased; in *Rex* v. *Kingston*, (1830) 4 Car. & P. 387, saying to the accused, "you are under suspicion of this, and you had better tell all you know;" in *Rex* v. *Enoch and Pulley*, (1833) 5 Car. & P. 539, saying: "You had better tell the truth or it will lie upon you, and the man go free;" in *Rex* v. *Mills*, (1833) 6 Car. & P. 146, saying: "It is no use for you to deny it, for there is the man and boy who will swear they saw you do it;" in *Sherrington's case*, (1838) 2 Lewin C. C. 123, saying: "There is no doubt thou wilt be found guilty, it will be better for you if you will confess;" in *Rex* v. *Thomas*, (1833) 6 Car. & P. 353, saying: "You had better split, and not suffer for all of them;" in *Rex* v. *Simpson*, (1834) 1 Moody, 410, and Ry. & Mood. 410, repeated importunities by neighbors and relatives of the prosecutor, coupled with assurances to the

suspected person that it would be a good deal worse for her if she did not, and that it would be better for her if she did confess; in *Rex* v. *Upchurch*, (1836) 1 Moody, 465, saying: "If you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; if William H. (another person suspected, and whom the prisoner had charged) is found clear, the guilt will fall on you. Pray, tell me if you did it;" in *Reg.* v. *Croydon*, (1846) 2 Cox C. C. 67, saying: "I dare say you had a hand in it; you may as well tell me all about it;" in *Reg.* v. *Garner*, (1848) 1 Den. C. C. 329, saying: "It will be better for you to speak out."

In *Reg.* v. *Fleming*, (1842) Arm., M. & O. 330, statements of a police officer suspected of having committed a crime, in answer to questions propounded by his superior in office, after the latter had warned the accused to be cautious in his answers, were held inadmissible. The court said: "The prisoner and the witnesses being both in the police force, the prisoner, as the witness admitted, might have conceived himself bound to tell the truth; and the caution was not of that nature which should make the confession of the prisoner admissible."

In the leading case of *Reg.* v. *Baldry*, (1852) 2 Den. C. C. 430, after full consideration, it was held that the declaration made to a prisoner, who had first been cautioned that what he said "would" be used as evidence, merely imported that such statement "might" be used, and could not have induced in the mind of the prisoner a hope of benefit sufficient to lead him to make a statement. The cases of *Reg.* v. *Drew*, *Reg.* v. *Harris*, *Reg.* v. *Morton* and *Reg.* v. *Furley*, heretofore referred to, were held to have been erroneously decided.

In the course of the argument, counsel for the prisoner cited and commented upon *Cass' case*, *Rex* v. *Thomas*, *Sherrington's case* and *Rex* v. *Enoch*, also heretofore referred to, as illustrating the doctrine that assuring the accused that it would be better for him to speak or other intimation given of possible benefit would invalidate a confession thus induced. After counsel had concluded his reference to these cases, Pollock, C. B., said (p. 432): "There is no doubt as to the appli-

cation of the rule in those cases, which are all familiar to the judges and to the bar."

In the course of the opinion, subsequently delivered by him, Chief Baron Pollock said (p. 442):

"A simple caution to the accused to tell the truth, if he says anything, has been decided not to be sufficient to prevent the statement made being given in evidence; and although it may be put that when a person is told to tell the truth, he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say anything, but if he says anything let it be true. It has been decided that that would not prevent the statement being received in evidence by Littledale, J., in the case of *Rex* v. *Court*, 7 Car. & P. 486, and by Rolfe, B., in a case at Gloucester, *Reg.* v. *Holmes*, 1 Car. & K. 248; but where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable, — the objectionable words being that it would be better to speak the truth, because they import that it would be better for him to say something. This was decided in the case of *Reg.* v. *Garner*, 1 Den. C. C. 329. The true distinction between the present case and a case of that kind is, that it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not."

In *Reg.* v. *Moore*, (1852) 2 Den. C. C. 522, also decided by the Court of Criminal Appeal, an admonition to a person suspected of crime that she "had better speak the truth," was held not to vitiate a subsequent confession, because not made by a person in authority. Parke, B., delivering the opinion of the judges, said, in substance, (p. 526,) that one element in the consideration of the question whether a confession ought to be excluded was "whether the threat or inducement was such as to be likely to influence the prisoner," and "that if the threat or inducement was held out, *actually or constructively* by a person *in authority*, it cannot be received, *however slight the threat or inducement*."

In *Reg.* v. *Cheverton*, (1862) 2 F. & F. 833, a statement made by a policeman to a person in his custody, that "you had better tell all about it, it will save you trouble," was held to operate as a threat or inducement sufficient to render what was said by the prisoner inadmissible.

In *Reg.* v. *Fennell*, (1881) 7 Q. B. D. 147, the Court for Crown Cases Reserved referred approvingly to the statement of the rule contained in Russell on Crimes, and, "upon all the decided cases," held inadmissible a statement made induced by the prosecutor saying to the prisoner in the presence of an inspector of police: "The inspector tells me you are making housebreaking implements; if this is so, you had better tell the truth, it may be better for you."

The latest decision in England on the subject of inducement, made by the Court for Crown Cases Reserved is *Reg.* v. *Thompson*, (1893) 2 Q. B. 12. At the trial a confession was offered in evidence, which had been made by the defendant before his arrest upon the charge of having embezzled funds of a certain corporation. Objection was interposed to its reception in evidence, on the ground that it had been made under the operation of an inducement held out by the chairman of the company in a statement to a relative of the accused, intended to be and actually communicated to the latter, that "it will be the right thing for Marcellus (the accused) to make a clean breast of it." The evidence having been admitted and the prisoner convicted, the question was submitted to the upper court whether the evidence of the confession was properly admitted. The opinion of the appellate court was delivered by Cave, J., and concurred in by Lord Coleridge, C. J., Hawkins, Day and Wills, JJ. After stating and adopting the ruling of Baron Parke in *Reg.* v. *Warringham*, 2 Den. C. C. 447 *n*, to the effect that it was the duty of the prosecutor to satisfy the trial judge that the confession had not been obtained by improper means, and that where it was impossible to collect from the proof whether such was the case or not, the confession ought not to be received, the opinion referred approvingly to the declaration of Pollock, C. B., in *Reg.* v. *Baldry*, that the true ground of the

exclusion of statements not voluntary was that "it would not be safe to receive a statement made under any influence or fear." The court then quoted the rule laid down in Russell on Crimes as being a statement of the principles which had been restated and affirmed by the Lord Chief Justice in the *Fennell case*, and added:

"If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask — Is it proved affirmatively that the confession was free and voluntary — that is, was it preceded by any inducement to make a statement held out by a person in authority? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible."

After reviewing the evidence and holding that, under the ruling of Pollock, C. B., in the *Baldry case*, it was immaterial whether the statements made by the chairman were calculated to elicit the truth, and intimating that they tended to lead the prisoner to believe that it would be better for him to say something, the opinion concluded with deciding that "on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary," the confession ought not to have been received.

Whilst, as we have said, there is no question that a police officer having a prisoner in custody is a person in authority within the rule in England, and therefore that any inducement by him offered, calculated to operate upon the mind of the prisoner, would render a confession as a consequence thereof inadmissible, there seems to be doubt in England whether the doctrine does not extend further, and hold that the mere fact of the interrogation of a prisoner by a police officer would *per se* render the confession inadmissible, because of the inducement resulting from the very nature of the authority exercised by the police officer, assimilating him in this regard to a committing or examining magistrate. 3 Russell on Crimes, p. 510, note *t*. In *Reg.* v. *Johnston*, 15 Ir. Com. Law, 60 (1864), this subject was elaborately considered by the

Irish Court of Criminal Appeal, seven of the judges writing opinions, and the majority concluding, on a full consideration of the English and Irish authorities, that a policeman was not such an official as would render *per se* any confession elicited by his questioning the prisoner inadmissible, although the fact of his questioning became an important element in determining whether inducement resulted from the language by him used. The English authorities, however, referred to in the above note to Russell on Crimes are later in date than *Reg.* v. *Johnston*, although they emanate from *nisi prius* courts and not from appellate tribunals. Whatever be the rule in this regard in England, however, it is certain that where a confession is elicited by the questions of a policeman, the fact of its having been so obtained, it is conceded, may be an important element in determining whether the answers of the prisoner were voluntary. The attempt on the part of a police officer to obtain a confession by interrogating has been often reproved by the English courts as unfair to the prisoner and as approaching dangerously near to a violation of the rule protecting an accused from being compelled to testify against himself. *Berriman's case*, (1854) 6 Cox C. C. 388; *Cheverton's case*, (1862) 2 F. & F. 833; *Mick's case*, (1863) 3 F. & F. 822; *Regan's case*, (1867) 17 L. T. (N. S.) 325, and *Reason's case*, (1872) 12 Cox C. C. 228.

From this review it clearly appears that the rule as to confessions, by an accused, (leaving out of consideration the rule now followed in England restricting the effect of inducements, according as such inducements were or were not held out by persons in authority,) is in England to-day what it was prior to and at the adoption of the Fifth Amendment, and that whilst all the decided cases necessarily rest upon the state of facts which the cases considered, nevertheless the decisions as a whole afford a safe guide by which to ascertain whether in this case the confession was voluntary, since the facts here presented are strikingly like those considered in many of the English cases.

We come then to the American authorities. In this court the general rule that the confession must be free and voluntary,

that is, not produced by inducements engendering either hope or fear, is settled by the authorities referred to at the outset. The facts in the particular cases decided in this court, and which have been referred to, manifested so clearly that the confessions were voluntary, that no useful purpose can be subserved by analyzing them. In this court also it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary, but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of the prisoner were voluntary. *Hopt* v. *Utah*, 110 U. S. 174; *Sparf* v. *United States*, 156 U. S. 51, 55. And this last rule thus by this court established is also the doctrine upheld by the state decisions.

In the various state courts of last resort the general rule we have just referred to, that a confession must be voluntary, is generally recognized; although in Indiana there is a statute authorizing confessions obtained by inducements to be given in evidence to the jury with all the attending circumstances, except when made under the influence of fear produced by threats, while it is also provided that a conviction cannot be had by proof of a confession made under inducement, "without corroborating testimony." Rev. Stat. Ind. 1881, § 1802. And, in the Texas Code of Procedure, article 750, it is provided that confessions shall not be used against a prisoner at his trial, "if, at the time it was made, the defendant was in jail or other place of confinement, nor where he was in custody of an officer, unless such confession be made in the voluntary statement of the accused, taken before an examining court in accordance with law; or be made voluntarily, after having been first cautioned that it may be used against him; or unless, in connection with such confession, he make statement of facts or of circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or instrument with which he states the offence was committed." Tex. Rev. Stat. 1879.

The English doctrine which restricts the operation of inducements solely to those made by one in authority has been adopted by some state courts, but disapproved of in others, as in Ohio. *Spears* v. *State*, 2 Ohio St. 583. Whether it is one which should be followed by this court in view of the express terms of the Constitution, need not be now considered, as it does not arise under the state of facts here presented. In some it is also held that the fact that the accused is examined on oath by a magistrate or coroner, or by a grand jury, with or without an oath, will, *per se*, exclude confessions, because of the influence presumed to arise from the authority of the examining officer or body. *People* v. *McMahon*, (1857) 15 N. Y. 384, followed in *People* v. *Mondon*, (1886) 103 N. Y. 211, 218; *State* v. *Matthews*, (1872) 66 N. C. 106; *Jackson* v. *State*, (1879) 56 Mississippi, 311, 312; *State* v. *Clifford*, (1892) 86 Iowa, 550. This doctrine as to examining magistrates is in some States enforced by statutes somewhat similar in character to the English statutes. (2 Taylor Ev. § 888, note 2.)

In some of the States it has been held that where questions are propounded to a prisoner by one having a right to ask them, and he remains silent, where from the nature of the inquiries, if innocent, reply would naturally be made, the fact of such silence may be weighed by the jury. See authorities collected in Chamberlayne's note to 2 Taylor Ev. 588[4], *et seq.*

Having stated the general lines upon which the American cases proceed, we will not attempt to review in detail the numerous decisions in the various courts of last resort in the several States, treating of confessions in the divergent aspects in which that doctrine may have presented itself but will content ourselves with a brief reference to a few leading and well considered cases treating of the subject of inducements, and which are, therefore, apposite to the issue now considered.

In the following cases, the language in each mentioned, was held to be an inducement sufficient to exclude a confession or statement made in consequence thereof: In *Kelly* v. *State*, (1882) 72 Alabama, 244, saying to the prisoner, "You have got your foot in it, and somebody else was with you;

now, if you did break open the door, the best thing you can do is to tell all about it, and to tell who was with you, and to tell the truth, the whole truth, and nothing but the truth;" in *People* v. *Barrie*, 49 California, 342, saying to the accused, "it will be better for you to make a full disclosure;" in *People* v. *Thompson*, (1890) 84 California, 598, 605, saying to the accused, "I don't think the truth will hurt anybody. It will be better for you to come out and tell all you know about it, if you feel that way;" in *Beery* v. *United States*, (1893) 2 Colorado, 186, 188, 203, advising the prisoner to make full restitution, and saying, "if you do so it will go easy with you; it will be better for you to confess; the door of mercy is open and that of justice closed;" and threatening to arrest the accused and expose his family if he did not confess; in *State* v. *Bostick*, (1845) 4 Harr. (Del.) 563, saying to one suspected of crime, "the suspicion is general against you, and you had as well tell all about it, the prosecution will be no greater, I don't expect to do anything with you; I am going to send you home to your mother;" in *Green* v. *State*, (1891) 88 Georgia, 516, saying to the accused, "Edmund, if you know anything, it may be best for you to tell it;" or, "Edmund, if you know anything, go and tell it, and it may be best for you;" in *Rector* v. *Commonwealth*, (1882) 80 Kentucky, 468, saying to the prisoner in a case of larceny, "it will go better with you to tell where the money is, all I want is my money, and if you will tell me where it is, I will not prosecute you hard;" in *Biscoe* v. *State*, (1887) 67 Maryland, 6, saying to the accused, "it will be better for you to tell the truth and have no more trouble about it;" in *Commonwealth* v. *Nott*, (1883) 135 Mass. 269, saying to the accused, "you had better own up; I was in the place when you took it; we have got you down fine; this is not the first you have taken, we have got other things against you nearly as good as this;" in *Commonwealth* v. *Meyers*, (1894) 160 Mass. 530, saying to the accused, "you had better tell the truth;" in *People* v. *Wolcott*, (1883) 51 Michigan, 612, saying to the accused, "it will be better for you to confess;" in *Territory* v. *Underwood*, (1888) 8 Montana, 131, saying to the prisoner that it would be better

to tell the prosecuting witness all about it, and that the officer thought the prosecuting witness would withdraw the prosecution or make it as light as possible; in *State* v. *York*, (1858) 37 N. H. 175, saying to one under arrest immediately before a confession, "if you are guilty you had better own it;" in *People* v. *Phillips*, (1870) 42 N. Y. 200, saying to the prisoner, "The best you can do is to own up; it will be better for you;" in *State* v. *Whitfield*, (1874) 70 N. C. 356, saying to the accused, "I believe you are guilty; if you are you had better say so; if you are not you had better say that;" in *State* v. *Drake*, (1893) 113 N. C. 624, saying to the prisoner, "if you are guilty, I would advise you to make an honest confession; it might be easier for you. It is plain against you;" in *Vaughan* v. *Commonwealth*, (1867) 17 Gratt. 576, saying to the accused, "you had as well tell all about it."

We come, then, to a consideration of the circumstances surrounding, and the facts established to exist, in reference to the confession, in order to determine whether it was shown to have been voluntarily made. Before analyzing the statement of the police detective as to what took place between himself and the accused it is necessary to recall the exact situation. The crime had been committed on the high seas. Brown, immediately after the homicide, had been arrested by the crew in consequence of suspicion aroused against him, and had been by them placed in irons. As the vessel came in sight of land, and was approaching Halifax, the suspicions of the crew having been also directed to Bram, he was arrested by them and placed in irons. On reaching port, these two suspected persons were delivered to the custody of the police authorities of Halifax and were there held in confinement awaiting the action of the United States consul, which was to determine whether the suspicions which had caused the arrest justified the sending of one or both of the prisoners into the United States for formal charge and trial. Before this examination had taken place the police detective caused Bram to be brought from jail to his private office, and when there alone with the detective *he was stripped of his clothing*, and either whilst the detective was in the act of so stripping him, or after he was

denuded, the conversation offered as a confession took place. The detective repeats what he said to the prisoner, whom he had thus stripped, as follows:

"When Mr. Bram came into my office I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.'"

The fact, then, is, that the language of the accused, which was offered in evidence as a confession, was made use of by him as a reply to the statement of the detective that Bram's co-suspect had charged him with the crime, and, although the answer was in the form of a denial, it was doubtless offered as a confession because of an implication of guilt which it was conceived the words of the denial might be considered to mean. But the situation of the accused, and the nature of the communication made to him by the detective, necessarily overthrows any possible implication that his reply to the detective could have been the result of a purely voluntary mental action; that is to say, when all the surrounding circumstances are considered in their true relations, not only is the claim that the statement was voluntary overthrown, but the impression is irresistibly produced that it must necessarily have been the result of either hope or fear, or both, operating on the mind.

It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not also have naturally arisen, that by denying there was hope of removing the suspicion from himself. If this must have been the state of mind of one situated as was the prisoner when the confession was made, how in reason

can it be said that the answer which he gave and which was required by the situation was wholly voluntary and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect. Indeed, the implication of guilt resulting from silence has been considered by some state courts of last resort, in decided cases, to which we have already made reference, as so cogent that they have held that where a person is accused of guilt, under circumstances which call upon him to make denial, the fact of his silence is competent evidence as tending to establish guilt. Whilst it must not be considered that by referring to these authorities we approve them, it is yet manifest that if learned judges have deduced the conclusion that silence is so weighty as to create an inference of guilt, it cannot, with justice, be said that the mind of one who is held in custody under suspicion of having committed a crime, would not be impelled to say something, when informed by one in authority that a co-suspect had declared that he had seen the person to whom the officer was addressing himself, commit the offence, when otherwise he might have remained silent but for fear of the consequences which might ensue; that is to say, he would be impelled to speak either for fear that his failure to make answer would be considered against him, or of hope that if he did reply he would be benefited thereby. And these self-evident deductions are greatly strengthened by considering the place where the statements were made and the conduct of the detective towards the accused. Bram had been brought from confinement to the office of the detective, and there, when alone with him, in a foreign land, while he was in the act of being stripped or had been stripped of his clothing, was interrogated by the officer, who was thus, while putting the questions and receiving answers thereto, exercising complete authority and control over the person he was interrogating. Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted, yet when taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference

that the statements of Bram were not made by one who in law could be considered a free agent. To communicate to a person suspected of the commission of crime the fact that his co-suspect has stated that he has seen him commit the offence, to make this statement to him under circumstances which call imperatively for an admission or denial and to accompany the communication with conduct which necessarily perturbs the mind and engenders confusion of thought, and then to use the denial made by the person so situated as a confession, because of the form in which the denial is made, is not only to compel the reply but to produce the confusion of words supposed to be found in it, and then use statements thus brought into being for the conviction of the accused. A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of.

Moreover, aside from the natural result arising from the situation of the accused and the communication made to him by the detective, the conversation conveyed an express intimation rendering the confession involuntary within the rule laid down by the authorities. What further was said by the detective? "Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But," I said, "some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." But how could the weight of the whole crime be removed from the shoulders of the prisoner as a consequence of his speaking, unless benefit as to the crime and its punishment was to arise from his speaking? Conceding that, closely analyzed, the hope of benefit which the conversation suggested was that of the removal from the conscience of the prisoner of the merely moral weight resulting from concealment, and therefore would not be an inducement, we are to consider the import of the conversation, not from a mere abstract point of view, but by the light of the impression that it was calculated to produce on the mind of the accused, situated as he was at the time the conversation took place. Thus viewed, the weight to be removed by speaking naturally im-

ported a suggestion of some benefit as to the crime and its punishment as arising from making a statement.

This is greatly fortified by a consideration of the words which preceded this language — that is, that Brown had declared he had witnessed the homicide, and that the detective had said he believed the prisoner was guilty and had an accomplice. It, in substance, therefore, called upon the prisoner to disclose his accomplice, and might well have been understood as holding out an encouragement that by so doing he might at least obtain a mitigation of the punishment for the crime which otherwise would assuredly follow. As said in the passage from Russell on Crimes already quoted, "the law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, and, therefore, excludes the declaration if any degree of influence has been exerted." In the case before us we find that an influence was exerted, and as any doubt as to whether the confession was voluntary must be determined in favor of the accused, we cannot escape the conclusion that error was committed by the trial court in admitting the confession under the circumstances disclosed by the record.

Our conclusion that the confession was wrongfully admitted renders it unnecessary to pass on the serious question arising from the ruling of the trial court by which in cross-examination the accused was denied the right to ask the detective as to an article of personal property taken from the prisoner at the time the alleged confession was had. In other words, that the accused could not bring out by way of cross-examination everything which took place at the time of the alleged confession, but was compelled, in order to do so, to make the detective his own witness, and therefore be placed in the position where he could not impeach him. We are also, as the result of our conclusion on the subject of the confession, relieved from examining the many other assignments of error, except in so far as they present questions which are likely to arise on the new trial.

We will now briefly consider the alleged errors of this character.

Opinion of the Court.

By plea and supplemental plea in abatement, and by motion to quash, defendant, preliminary to the trial, attacked the sufficiency of the indictment, because one of the grand jurors was permitted to affirm and the indictment failed to state that such juror was "conscientiously scrupulous" of being sworn, and because the indictment recited that it was presented upon the "oath" of the jurors, when, in fact, it was presented upon the oath *and affirmation* of the jurors. At the hearing of the pleas in abatement, it appeared that when the grand jurors were empanelled one of them, upon being called to be sworn, stated that he affirmed, and declined to take an oath, and after his fellows had been regularly sworn he was formally affirmed to the same duties specified in the oath administered to the others. It is also stated in the record, following the recital of the issuance of venires for grand and petit jurors, that —

"In obedience to the said order of court, and to the venires issued thereunder, the following-named grand jurors attended on the fifteenth day of October, A.D. 1896. On that day the said grand jurors were duly empanelled as the grand jury for the October term of this court, A.D. 1896. All of said grand jurors, being empanelled aforesaid, were duly sworn, except grand juror William Merrill, Junior, of West Newbury, who duly affirmed, twenty-one grand jurors being in attendance."

In section 1 of the Revised Statutes of the United States it is provided, among other things, that, in determining the meaning of the Revised Statutes, "a requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form." Section 800 also provides that —

"Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practised in such state courts, so far as such may be practica-

ble by the courts of the United States or the officers thereof. And for this purpose the said courts may, by rule or order, conform the designation and empanelling of juries, in substance, to the laws and usages relating to jurors in the state courts, from time to time in force in such State. This section shall not apply to juries to serve in the courts of the United States in Pennsylvania."

The Public Statutes of Massachusetts, 1882, chap. 213, section 6, provide as follows:

"SECTION 6. When a person returned as grand juror is conscientiously scrupulous of taking the oath before prescribed, he shall be allowed to make affirmation, substituting the word 'affirm' instead of the word 'swear,' and also the words 'this you do under the pains and penalties of perjury' instead of the words 'so help you God.'"

And section 3 of chapter 3 of the same statutes provides as follows (p. 58):

"In the construction of statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general court or repugnant to the context of the same statute, that is to say, . . . Fourteenth. The word 'oath' shall include 'affirmation' in cases where, by law, an affirmation may be substituted for an oath."

The objection that the indictment recited that it was presented "upon the oath" of the jurors, when the fact was that it was presented upon the "oath and affirmation" of the jurors, is without merit. Waiving a consideration of the question whether, under the provisions of the statutes to which reference has been made, the word "oath" might not properly be construed as meaning either "oath" or "affirmation," the recital alluded to was purely formal, and if defective was open to amendment. The record disclosing the fact that all of the grand jurors were duly sworn except grand juror William Merrill, Junior, who was "duly affirmed," the defendant could not have been prejudiced by the form of the statement made in the indictment, and the defect, if any, was rendered harmless by the curative provisions of section 1025, Revised Statutes.

The further objection that neither in the indictment nor in the proof at the hearing of the pleas in abatement was it affirmatively stated or shown that grand juror Merrill, before being permitted to affirm, was proven to have possessed conscientious scruples against taking an oath, is practically concluded by the disposition made of the objection just passed upon, and is rendered nugatory by the terms of § 1025, Revised Statutes. Further, the mode of ascertaining the existence or non-existence of such conscientious scruples was committed to the discretion of the officer who affirmed the juror, and such affirmation conclusively established that the officer had properly exercised his discretion. *Commonwealth* v. *Fisher*, 7 Gray, 492; *State* v. *Adams*, 78 Maine, 486.

The remaining assignments which we deem it proper to notice relate to the overruling of objections interposed to questions propounded to certain witnesses in the character of experts. Some of these objections were made to hypothetical questions asked a number of sailors, reciting the condition of things assumed to have been established by the evidence as existing about the time of the killing, viz., the speed of the Herbert Fuller, the condition of her sails, direction of wind, etc., an inquiry as to the effect it would have on the vessel if the wheelman had taken his hands off the wheel, and what effect would be produced by lashing the wheel under similar conditions. These questions were evidently intended to supplement the testimony of Brown, who swore that he stood with both hands on the wheel during the time between twelve and two o'clock, and, consequently, when the murders were committed. The questions were competent, as the testimony sought to be elicited was relevant to the issue. Aside from the testimony of Brown the evidence against Bram was purely circumstantial, and it was clearly proper for the Government to endeavor to establish, as a circumstance in the case, the fact that another person who was present in the vicinity at the time of the killing, could not have committed the crime. The testimony sought to be adduced had this tendency, and the fact that it might operate indirectly to fortify the credit of such person as a witness in the cause could not affect its admissibility.

Dissenting Opinion: Brewer, J., Fuller, C.J., Brown, J.

An objection to a question asked of a medical witness, whether, in his opinion, a man standing at the hip of a recumbent person and striking blows on that person's head and forehead with an axe would necessarily be spattered with, or covered with, some of the blood, was also properly overruled. We think the assumed facts recited in the question were warranted by the proof in the case, and that the evidence sought to be elicited from the witness was of a character justifying an expression of opinion by the witness, the jury after all being at liberty to give to the evidence such weight as in their judgment it was entitled to. *Hopt* v. *Utah*, 120 U. S. 430.

The judgment is reversed and the cause remanded with directions to set aside the verdict and to order a new trial.

MR. JUSTICE BREWER, with whom concurred MR. CHIEF JUSTICE FULLER, and MR. JUSTICE BROWN, dissenting.

I dissent from the opinion and judgment in this case —

First, because I think the testimony was not open to objection. "A confession, if freely and voluntarily made, is evidence of the most satisfactory character." *Hopt* v. *Utah*, 110 U. S. 574, 584; reaffirmed in *Sparf* v. *United States*, 156 U. S. 51, 55. The fact that the defendant was in custody and in irons does not destroy the competency of a confession. "Confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear, or by promises." *Sparf* v. *United States*, *supra*; see also *Wilson* v. *United States*, 162 U. S. 613, 623.

The witness Power, when called, testified positively that no threats were made nor any inducements held out to Bram, and this general declaration he affirmed and reaffirmed in response to inquiries made by the court and the defendant's counsel. The court, therefore, properly overruled the objection at that time made to his testifying to the statements of defendant. It is not suggested that there was error in this ruling, and the fact that inducements were held out is deduced only from the testimony subsequently given by Power of the

conversation between him and Bram. The first part of that conversation is as follows: "When Mr. Bram came into my office, I said to him: 'Bram, we are trying to unravel this horrible mystery.' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me; where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.'" In this there is nothing which by any possibility can be tortured into a suggestion of threat or a temptation of hope. Power simply stated the obvious fact that they were trying to unravel a horrible mystery, and the further fact that Brown had charged the defendant with the crime, and the replies of Bram were given as freely and voluntarily as it is possible to conceive.

It is strange to hear it even intimated that Bram up to this time was impelled by fear or allured by hope caused in the slightest degree by these statements of Power.

The balance of the conversation is as follows: "I said, 'Now, look here, Bram, I am satisfied that you killed the captain from all I have heard from Mr. Brown. But,' I said, 'some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders.' He said: 'Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it.' He was rather short in his replies." And here, it is argued, was a suggestion of a benefit — the holding out of a hope that a full disclosure might somehow inure to his advantage. To support this contention involves a refinement of analysis which, while it may show marvellous metaphysical ability, is of little weight in practical affairs. But even if it did carry any such improper suggestion it was made at nearly the close of the conversation, and that this suggestion then made had a retroactive effect and transformed the previous voluntary statements of Bram into statements made under the influence of fear or hope, is a psychological process which I am unable to comprehend. The only reply

which Bram made to the question containing this supposed improper suggestion was this: "Well, I think, and many others on board the ship think, that Brown is the murderer; but I don't know anything about it." Can it for a moment be thought that such a reply was so significant that, permitting it to go to the jury, compels the putting at naught this protracted trial, and overthrowing the deliberate verdict of the twelve men who heard the evidence and condemned the defendant? With all respect to my brethren who are of a different opinion, I can but think that such a contention is wholly unsound, and that in all this conversation with Bram there was nothing of sufficient importance to justify the reversal of the judgment.

Again, there is a lack of any proper objection or exception, and if there is any one thing which may be considered as settled in all appellate courts it is that an error in the admission of testimony will not be considered unless there was a specific objection and exception at the trial. "To authorize any objection to the admission or exclusion of evidence, or to the giving or refusal of any instructions to the jury, to be heard in this court, the record must disclose not merely the fact that the objection was taken in the court below, but that the parties excepted at the time to the action of the court thereon." *Hutchins* v. *King*, 1 Wall. 53, 60; *United States* v. *McMasters*, 4 Wall. 680, 682. "Our power is confined to exceptions actually taken at the trial." *Railway Company* v. *Heck*, 102 U. S. 120. See also *Moore* v. *Bank of Metropolis*, 13 Pet. 302; *Camden* v. *Doremus*, 3 How. 515; *Zeller's Lessee* v. *Eckert*, 4 How. 289, 297; *Phelps* v. *Mayer*, 15 How. 160; *Dredge* v. *Forsyth*, 2 Black, 563; *Young* v. *Martin*, 8 Wall. 354; *Belk* v. *Meagher*, 104 U. S. 279; *Hanna* v. *Maas*, 122 U. S. 24; *White* v. *Barber*, 123 U. S. 392, 419; *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U. S. 383; *Anthony* v. *Louisville & Nashville Railroad*, 132 U. S. 172; *Block* v. *Darling*, 140 U. S. 234; *Bogk* v. *Gassert*, 149 U. S. 17.

It is true these were civil cases. For it is only in the later history of this court that we have had jurisdiction of writs of

error in criminal cases, but the law is equally applicable to the latter. "It is the duty of counsel seasonably to call the attention of the court to any error in empanelling the jury, in admitting testimony, or in any other proceeding during the trial, by which his rights are prejudiced, and in case of an adverse ruling to note an exception." *Alexander* v. *United States*, 138 U. S. 353, 355. "The general rule undoubtedly is that an objection should be so framed as to indicate the precise point upon which the court is asked to rule." *Sparf* v. *United States*, 156 U. S. 51, 56; *Holder* v. *United States*, 150 U. S. 91; *Tucker* v. *United States*, 151 U. S. 164.

It is true the defendant objected to the admission of the conversation before it was given, but upon the state of facts as then presented unquestionably the trial court ruled properly in permitting the witness to testify, for he positively declared that there was neither threat nor promise, intimidation or inducement. If it be true, as the court now holds, that in the progress of his testimony it was developed that he did make a statement which carried an inducement — a suggestion of hope — it was then the duty of the defendant to call the attention of the court to the matter, either by objecting to any further disclosures of the conversation, or else by a motion to strike out. Nothing of the kind took place. Defendant was apparently content to let all of the subsequent conversation come in. Can it be held that the court erred in not of its own motion stopping the witness, or striking out the testimony, or instructing the jury to disregard it, when defendant asked nothing of the kind? Surely by this decision we practically overrule the long line of authorities heretofore cited affirming the necessity of calling the attention of the trial court to the specific matter, obtaining its ruling thereon and saving an exception thereto before there is any jurisdiction in this court to review. Nor is this a mere technical and arbitrary rule which may be dispensed with whenever the exigencies of any case seem to demand, and in no other way a ground for reversal can be discovered. It may be, and, undoubtedly, often is the case, that though incompetent testimony be given the defendant prefers that it shall remain in order,

for certain purposes, to take advantage of it in the argument before the jury. Can it be possible that he may obtain this advantage, and, having obtained and used it, insist that, because of such incompetent testimony, he is entitled to a reversal of the judgment against him? *Wilson* v. *United States*, 162 U. S. 613, 624. Who shall say that this defendant, though at first objecting to any testimony respecting his statements, yet, after hearing what the witness said, did not prefer that such testimony remain, as it disclosed that, at the very first moment he was informed that Brown charged him with the crime, he protested that Brown was not in a position where he could see who did the killing? Indeed, for anything in this record to the contrary, he, when a witness in his own behalf, may have given the same version of the conversation, and admitted that his statements were voluntarily made. Who shall say that he did not wish to argue before the jury that the claim made of Brown's inability to see what took place was not an excuse suggested only by the exigencies of the trial, but was presented at the very first moment of the charge; and if he was willing to let the testimony remain and have all the advantage which he could take of it in argument before the jury, can it be that he can now come to this court and say "true I did not object to this specific testimony, nor ask to have it stricken out, but it was incompetent," and obtain a reversal on the ground of its admission?

I dissent, therefore, first, because I think the testimony was properly received; and, secondly, because no motion was made to strike it out and no exception taken to its admission.